

## Entertainment Law in the State of Wisconsin

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## SURVEYS

### ENTERTAINMENT LAW IN THE STATE OF WISCONSIN

#### NATIONAL SPORTS LAW INSTITUTE OF MARQUETTE UNIVERSITY LAW SCHOOL\*

##### I. INTRODUCTION

In Volume 15, Number 2, the spring 2005 issue of the *Marquette Sports Law Review*, and with the support of the Sports & Entertainment Law Section of the State Bar of Wisconsin, the National Sports Law Institute published a special report on *Sports Law in the State of Wisconsin*.<sup>1</sup> As the Section is devoted to two distinct areas of law, the Section also supported the research and development of this second report on *Entertainment Law in the State of Wisconsin*.

Entertainment and the law have intersected in many different ways in Wisconsin, where litigation within the entertainment industry has involved a variety of areas of law, from intellectual property to constitutional law. The purpose of this survey is to provide an overview of the development of entertainment law in the state of Wisconsin until the end of the year 2006. With the support of the Sports & Entertainment Law Section of the State Bar of Wisconsin, the Institute began to compile the cases and statutes that make

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\* This report was developed and drafted under the supervision of Professor Paul Anderson, Associate Director of the National Sports Law Institute, faculty advisor to the *Marquette Sports Law Review* and Chair of the Sports & Entertainment Law Section of the State Bar of Wisconsin.

Marquette University Law School student Jay Smith (L'07), a 2006–2007 NSLI research assistant drafted the initial report with the editorial assistance of Judy Massuda (L'07), Lindsay Potrafke (L'07), and Megan Ryther (L'07). Research and writing of various parts of the report and early drafts of sections within the report were prepared by several current and former students including: Katie Featherston (L'06), Associate Attorney, Quarles & Brady, Milwaukee, WI; Justin Leinwand (L'07), Judy Massuda (L'07), Megan Ryther (L'07), and Jay Smith (L'07). In addition, Attorney Beth Russell, of Russell Law in Madison, Wisconsin provided the initial guidance that set the framework for the report.

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1. Nat'l Sports Law Institute of Marquette Univ. Law School, *Survey: Sports Law in the State of Wisconsin*, 15 MARQ. SPORTS L. REV. 425 (2005).

up this report in 2005.<sup>2</sup> The focus of the report is on the rich history of case and statutory law in Wisconsin focusing on legal issues in the entertainment industry. For ease of understanding, the cases included are separated into distinct areas of the entertainment industry. Within each area of the entertainment industry, the cases are then broken up by the area of law addressed in each case. The areas of entertainment covered include: (1) film, (2) television, (3) music, (4) radio, (5) art, publishing, and performance, (6) entertainment facilities, and (7) new technologies (computer/internet). Within each of these industry segments the cases are arranged in chronological order.

This survey is a starting point for practitioners undertaking the practice of entertainment law in the state of Wisconsin. It is also intended to provide an in depth look at how the law has impacted the entertainment industry in the state of Wisconsin.

## II. FILM

Wisconsin is not known for its film production; however, there have been numerous cases within the film industry. These disputes have primarily dealt with three areas of law: constitutional law, intellectual property law, and antitrust law.

### 1. *Constitutional Law*

Constitutional law is an area that significantly affects the film industry, from owners and operators of video stores and motion picture production companies, to local school systems. First Amendment protection for business owners and students must be balanced with policies established by local ordinances, state statutes, and school boards. In these disputes, one party is usually prohibited from operating its business in a certain way, while the other party is attempting to enforce state or local regulations.

#### *Nat'l Ass'n of Theatre Owners v. Motion Picture Comm'n*<sup>3</sup>

NATO, Marcus Theatres Management Corporation, U.A. Theatres of Wisconsin, RKO-Stanley Warner Theatres, and Milwaukee Towne Corporation moved for declaratory judgment and a preliminary injunction to prevent the enforcement of a Milwaukee ordinance that empowered the

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2. The research conducted for this report is as comprehensive as possible. However, practitioners should not substitute the research and reporting conducted herein for their own research of cases and statutes in any particular situation.

3. 328 F. Supp. 6 (E.D. Wis. 1971).

Milwaukee Motion Picture Commission. The ordinance would not permit anyone from showing a motion picture to the public without first applying to the Motion Picture Commission for classification of the film. The commission had the power to classify films as "Adults Only" if it determined that the film had pornographic or obscene content. The plaintiffs asserted that the ordinance and its enforcement violated its First<sup>4</sup> and Fourteenth<sup>5</sup> Amendment rights.

The court held that the plaintiffs had standing and that the Commission had the capacity to be sued under Wisconsin law. The court issued injunctive relief because the ordinance violated the plaintiffs' constitutional rights. The court found that the ordinance violated the First Amendment because it restrained free speech rights and its enforcement would have caused a reduction in their income that was irreparable in an action at law. The court also held that the ordinance violated the plaintiffs' Fourteenth Amendment rights because it failed to provide clear standards for classification for films and it failed to provide prompt judicial review of classification decisions by the Commission.

*Kucharek v. Hanaway*<sup>6</sup>

The Denmark Bookstore, which was owned and operated by Shangri-La Enterprises Inc., sold sexually explicit videotapes. Kucharek, an employee at the Denmark bookstore, and Shangri-La Enterprises, sued Hanaway, the attorney general of Wisconsin. They were joined as plaintiffs by Paradise One and Gem Books, which also sold adult videos. The plaintiffs challenged the constitutionality of Wisconsin's obscenity law.<sup>7</sup> The storeowners sought a preliminary injunction, and Hanaway moved to dismiss the action or to abstain.

The court granted the preliminary injunction. The storeowners successfully argued that the statute was vague and it was uncertain what was covered under the statute. Reasonable doubt existed about what manner of portrayal qualified as obscene material under the obscenity statute. Abstention would have been inappropriate since it would have caused further delay without avoiding constitutional adjudication. The plaintiffs had a reasonable likelihood of prevailing even though the statute as a whole served a legitimate state purpose of curtailing commercialized obscenity.

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4. U.S. CONST. amend. I.

5. U.S. CONST. amend. XIV.

6. 714 F. Supp. 1499 (E.D. Wis. 1989).

7. WIS. STAT. § 944.21 (2006).

*Kucharek v. Hanaway*<sup>8</sup>

The Seventh Circuit reversed the district court's ruling and vacated the order for an injunction. The court held that the statute was not unconstitutionally vague. The court found that ambiguity in a statute does not necessarily make the statute unconstitutionally vague. The court determined that the state court could easily resolve the ambiguity in the statute in this situation.

*Borger v. Bisciglia*<sup>9</sup>

Several teachers at a high school in Kenosha, Wisconsin, wanted to show "Schindler's List" in their classrooms. However, the superintendent of the school system denied the teachers' request because the film was rated "R" and was thus banned from the curriculum by the school district policies. Ben Borger, a student, wanted the school board to allow his government class to show "Schindler's List." He filed an action against the school, the superintendent, and the school board. Borger claimed that the use of a school district policy to prohibit viewing R-rated movies by students as a part of the curriculum violated his First Amendment rights. Borger sought a preliminary injunction to bar the school district from enforcing its policy about R-rated movies. The defendants filed motions for summary judgment.

The court denied the preliminary injunction and held that students' First Amendment rights are "tempered within the classroom." The court held that limiting access to materials based on content bears a reasonable relationship to a legitimate governmental concern. The concern is that high school students should not be subjected to an R-rated movie due to its violence, nudity, and bad language. The court stated that the superintendent's use of the rating system is a reasonable way of determining what material is inappropriate for students.

## 2. Intellectual Property Law

Most entertainment entities, such as motion picture companies, rely heavily on intellectual property rights, for example in films, to generate substantial revenue streams. The following cases discuss claims of trademark infringement of a company logo and copyright infringement of motion

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8. 902 F.2d 513 (1990).

9. 888 F. Supp. 97 (E.D. Wis. 1995).

pictures.

#### A. Trademark

Trademark holders have a significant interest in the protection of their trademarks because trademarks are used to identify the source of products. Trademarks are protected by the Lanham Act.<sup>10</sup> State law provides additional protection against trademark infringement. This case shows how the U.S. District Court for the Eastern District of Wisconsin handled trademark infringement in the film industry.

*Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc.*<sup>11</sup>

Harley filed a trademark infringement action against defendants Columbia, Tristar Home Video, New Line Cinema Corp, and New Line Home Video Inc., alleging that the defendants used Harley's registered logo in connection with the sale and advertising of a film on videotape. The design was almost identical to the Harley logo except that the defendants' logo contained names of the lead actors in the film, not Harley's name.

Defendants filed motions to transfer venue and to seal supporting affidavits. The court denied the motions, holding that venue was proper since defendants were engaged in substantial, non-isolated activities in Wisconsin and that the products serviced or manufactured by the defendants were sold in Wisconsin in the ordinary course of trade. With respect to the protective order, defendants failed to address their burden to show good cause as to why the order was necessary.

#### B. Copyright

Similar to trademark law, copyright law is very important in the entertainment industry. This is particularly true in the film industry where the value of the film is in the copyright held by the company that produced the film. The federal Copyright Act<sup>12</sup> protects copyright owners from infringement. There is one Wisconsin case where an individual illegally distributed copyrighted films.

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10. 15 U.S.C.S. (2006).

11. 851 F. Supp. 1265 (E.D. Wis. 1994).

12. 17 U.S.C.S. § 101, et. seq. (2006).

*Columbia Pictures Indus., Inc. v. Richardson*<sup>13</sup>

Several motion picture companies filed a copyright infringement suit against Richardson, an unauthorized distributor who reproduced and distributed 209 of the companies' copyrighted motion pictures. The companies moved for summary judgment, and the court granted it along with a permanent injunction, holding that the companies owned valid copyrights pursuant to 17 U.S.C. § 410(c). The distributor argued that he did not personally engage in any illegal duplication of any copyrighted materials. However, the court held that he was liable for copyright infringement because the sales or rentals of unauthorized copies of the copyrighted films took place within the confines of his video store. Furthermore, the distributor had proper notice that the materials were copyrighted materials.

### 3. Antitrust

Antitrust laws are designed to protect consumer interests by banning business activities that lead to a decrease in competition. The federal antitrust law is codified in the Sherman Antitrust Act,<sup>14</sup> which has two sections. Section one prohibits agreements among parties that unreasonably restrain trade.<sup>15</sup> Section two prevents an individual or firm from creating a monopoly.<sup>16</sup>

The following two Wisconsin cases deal with antitrust issues involving concerted action by motion picture companies.

*Loew's, Inc. v. Milwaukee Towne Corp.*<sup>17</sup>

The plaintiff, Milwaukee Towne Corporation (MTC), operated a motion picture theatre in downtown Milwaukee. MTC alleged that certain other Milwaukee theatres were given exclusive first-run opportunities for some motion pictures and that it was not given the chance to compete for the first-run licenses. MTC brought an antitrust suit against the defendant motion picture distributors seeking damages and injunctive relief.

The district court ruled in favor of MTC, and the defendants filed a cross-complaint to obtain an interpretation of the injunction provision. The district court held that the decree meant that MTC was entitled to a competitive

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13. No. 95-C-0868, 1996 U.S. Dist. LEXIS 22117 (W.D. Wis. June 6, 1996).

14. 15 U.S.C. §§ 1-2 (2006).

15. *Id.* § 1.

16. *Id.* § 2.

17. 201 F.2d 19 (7th Cir. 1952).

position superior to that of any other operator with respect to its right to obtain licenses to exhibit motion pictures. The defendants appealed the district court's interpretation, and the Seventh Circuit reversed, holding that the lower court erroneously construed the decree as meaning the defendants could not resort to competitive bidding to determine what a fair and reasonable film rental was. The court found that MTC was not entitled to a position superior to all other operators, but instead it was entitled to a decree that would place it in an equal competitive position with other operators.

*United States v. Capitol Serv., Inc.*<sup>18</sup>

The U.S. Government filed a civil antitrust action against four motion picture theatre operators in the Milwaukee area. The defendants owned and operated most of the first-run movie picture theatres in and around Milwaukee. The government contended that the defendants' practice of "splitting," or allocating among themselves the rights to negotiate for films released by motion picture distributors constitutes a restraint of trade and is *per se* illegal under the Sherman Act.<sup>19</sup> The defendants argued that the split was reasonable under a rule of reason analysis. The court held that defendants intended for the split to reduce price competition in the market, and the split had many adverse, indirect effects on the price paid for films. Thus, the court rejected the rule of reason analysis and determined that the restraint was *per se* illegal. Even though the defendants presented evidence that the split had pro-competitive benefits, the court dismissed the benefits as immaterial. The court entered judgment for the government and enjoined the defendants from splitting motion pictures.

### III. TELEVISION

Television is another area of the entertainment industry that has sparked the interest of Wisconsin courts. Like any other state, television is a major source of entertainment for many people in Wisconsin. Wisconsin's television disputes have involved many legal issues including tort law, contract law, intellectual property law, antitrust law, unfair trade practice, and property law.

#### 1. Tort Law

Television stations carry inherent risks for reporting the news. One of those risks is that individuals may have a tort claim against the station for

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18. 568 F. Supp. 134 (E.D. Wis. 1983).

19. 15 U.S.C. § 1 (2006).



defamation and invasion of privacy. In Wisconsin, there have been three published cases where individuals claiming defamation and invasion of privacy have sued television stations.

#### A. Defamation

Two of the television tort cases in Wisconsin have involved claims of defamation. The elements of a defamation claim in Wisconsin are “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”<sup>20</sup> Television stations need to be conscious of defamation because they are often reporting information that is harmful to the reputation of others. However, courts have given stations significant deference when the subject of the news is a public figure or someone of public interest.

#### *Bay View Packing Co. v. Taff*<sup>21</sup>

As part of its coverage on the contamination of the City of Milwaukee’s water supply, the defendant television station reported on the plaintiff food processor’s failure to promptly comply with the city’s advisory recommendation for preparing food products and with a federal government recall order. The plaintiff subsequently sued the television station and the environmental health specialist who appeared on the television broadcast, claiming they defamed the food processor.

The circuit court granted summary judgment to the defendant, and the Wisconsin Court of Appeals affirmed. The court of appeals held that summary judgment was properly granted because the plaintiff fit the status of being an involuntary, limited purpose public figure with respect to the public controversy surrounding the potential distribution of contaminated food products. The plaintiff also did not prove that the television station acted with “actual malice” when it allegedly made the defamatory statements. Since the plaintiff admitted that the statements made by the environmental health specialist were true, summary judgment was also proper regarding the specialist.

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20. *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 529 (Wis. Ct. App. 1995).

21. 543 N.W.2d 522 (Wis. Ct. App. 1995).

*Erdmann v. SF Broad.*<sup>22</sup>

A sixteen-year-old boy dialed 9-1-1, claiming that a masked man shot him in the stomach. The boy's father told police that he was certain that the shooter was Erdmann. The police discovered that Erdmann was a "survivalist," who could easily access several weapons and had reportedly been stalking the boy's sister. On the afternoon that the boy was shot, the sheriff held a news conference. He described the incident as reported to him and advised reporters that the department was looking for Erdmann, who was expected to be armed and dangerous. Erdmann was later arrested, and the defendant television station reported the story on its evening newscast. The following day, the boy confessed that he shot himself, and the police released Erdmann. The boy's confession and Erdmann's reaction to the false allegation were broadcasted numerous times. Erdmann filed a defamation action against the defendants.

The defendants' motion for summary judgment was granted by the lower court, and Erdmann appealed. The court of appeals determined that Erdmann was a limited purpose public figure and was required to provide evidence that the defendants acted with actual malice in order to prove defamation. Erdmann did not prove actual malice because there was no evidence that the newscast was not a fair statement of police information, and no evidence existed to lead the defendants to believe that the information it received from the police was not true.

## B. Invasion of Privacy

The other television tort case dealt with an invasion of privacy claim. Individuals have certain rights of privacy. Included in the right of privacy is a right to keep certain information private. However, as this next case will show, this right to keep information private becomes much more limited once the information has been disclosed during the taping of a television program.

*Howell v. Tribune Entm't Co.*<sup>23</sup>

Tammy Howell, a sixteen-year-old, appeared on the Charles Perez Show along with her older sister and stepmother. The show was produced by Tribune Entertainment and broadcast nationwide on television. The show was about how stepchildren and stepparents have had trouble getting along. During the show, the two sisters engaged in putdowns of their stepmother,

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22. 599 N.W.2d 1 (Wis. Ct. App. 1999).

23. 106 F.3d 215 (7th Cir. 1997).

who in return engaged in putdowns of the two sisters. The stepmother actually began to read from Tammy's police report during the argument on national television. The report stated that Tammy engaged in violent, abusive, and unreasonably loud behavior. The show aired on national television two weeks after it was taped. After the show aired, Tammy began to have trouble with her peers and school and eventually was forced to change schools. Tammy later sued Tribune Entertainment for invasion of privacy, seeking damages for the humiliation and mental anguish inflicted by the publicity that the broadcast gave to the contents of the police report.

The district court dismissed the diversity action for failure to state a claim. The Seventh Circuit affirmed the decision. It held that once Tammy accused her stepmother of doing bad things, Tammy's character was put at issue. In order to prevent a one-sided view of the argument, Tribune Entertainment was allowed to assert the stepmother's privilege of defending her own character. The court also found that Tammy forfeited any objection to the broadcast by not complaining prior to the defendant airing show.

## 2. *Contract Law*

The following cases deal with issues surrounding television contracts in Wisconsin. These cases focus on breach of sponsorship contracts, cable television franchise rights, and contracts between the cable company and its customers.

### *Columbia Broad. Sys., Inc. v. Amana Refrigeration, Inc.*<sup>24</sup>

CBS sued Amana, a corporate sponsor, for breach of a sponsorship contract. CBS alleged that Amana failed to make payments set by the contract. Amana counterclaimed under sections two and three of the Clayton Act.<sup>25</sup> Amana alleged that CBS damaged Amana by (1) granting greater discounts on the basis of quantity to other sponsors, (2) requiring Amana to purchase network time over a specified group of television stations, which included all of the stations owned and operated by CBS, and (3) refusing to sell network time of Amana's choice to Amana unless Amana agreed to sponsor a program in which CBS had a financial interest. The district court dismissed Amana's counterclaims for failure to state a claim upon which relief could be granted. Amana appealed.

The first issue on appeal was whether Amana set forth price

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24. 295 F.2d 375 (7th Cir. 1961).

25. 15 U.S.C. §§ 13(a), 14 (2006).

discrimination in its counterclaim involving purchasers of products of like grade and quality. The second issue was whether Amana set forth prohibited tie-in practices in connection with a contract for the sale of goods. The Seventh Circuit affirmed the district court's decision, holding that Amana purchased the privilege of having itself identified as a corporate sponsor of a given television program and the opportunity to advertise its products during that program. As such, Amana did not really purchase television time. In addition, such a sponsorship does not constitute the sale of commodities or goods for the purposes of the Clayton Act, and therefore, Amana could not make a price discrimination claim. Finally, the court held that the Clayton Act does not bar tie-in practices in connection with the sale of goods.

*Jones Intercable, Inc. v. City of Stevens Point*<sup>26</sup>

The City of Stevens Point approved the assignment of cable television franchise rights to Jones, the franchisee, with the provision that Jones not decrease the number and kinds of basic service channels. Jones subsequently dropped and replaced two channels from its channel line-up, USA Network (added a religious network in its place) and WWOR (added TNT in its place). The city issued a notice of default to Jones stating that Jones must reinstate the channels or face franchise revocation proceedings. This notice of default was subsequently dropped but not before Jones filed an action against Stevens Point for declaratory and injunctive relief under the Cable Communications Policy Act of 1984<sup>27</sup> and under the First Amendment. Stevens Point argued that dropping USA Network and WWOR was a violation of the Act and of the franchise agreement between the two parties. Jones filed a motion for summary judgment, which the district court granted in part and denied in part.

The district court first held that the city's voluntary withdrawal of the notice of default did not render the action moot. The court then addressed the merits of the case, holding that under the Act Jones was not required to request modification of its franchise agreement before dropping specific cable channels. The court also held that Jones did not violate its franchise agreement with Stevens Point when it dropped USA Network from its lineup and that the Act prohibited the city from requiring Jones to reinstate the two dropped channels.

The court denied Jones summary judgment with respect to dropping WWOR from its lineup. The court found that "east coast programming," which is what WWOR provided to Stevens Point citizens, was a sufficiently

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26. 729 F. Supp. 642 (W.D. Wis. 1990).

27. 47 U.S.C. §§ 521-559 (2006).

broad category within the city's enforcement power and that the programming was no longer available after Jones dropped WWOR. Based on those findings, the court decided that the question of whether Jones violated the franchise agreement in dropping WWOR was not appropriate for summary judgment.

*Putnam v. Time Warner Cable of S.E. Wis.*<sup>28</sup>

Time Warner imposed a \$5 late payment fee on customers who did not timely pay their monthly cable bill, as specified in their contracts with Time Warner. Kerry Putnam, Carol Smith-Carter, and Louis Boutan, all customers of Time Warner, sued individually and on behalf of similarly situated Time Warner customers. The plaintiffs sought to recover (1) monetary damages for the portion of the fee that allegedly was not reasonably related to Time Warner's actual costs incurred as a result of late payments, (2) declaratory relief, and (3) injunctive relief. The customers had previously been paying the \$5 late fees but without the knowledge that the actual cost to Time Warner for the customers not paying on time was around \$.38–\$.48. Time Warner moved to dismiss the claims. Milwaukee County Circuit Court dismissed the claims based on the legal insufficiency of the complaint. The court determined that the voluntary payment doctrine precluded the claim for monetary damages, and the declaratory and injunctive relief claims were not ripe for judicial review because the customers failed to allege a present harm. The Wisconsin Court of Appeals confirmed the dismissal. The plaintiffs then appealed to the Supreme Court of Wisconsin.

On review, the customers argued that the circuit court erroneously applied the voluntary payment doctrine to bar their damages claim, and that the court erroneously disallowed their claims for declaratory and injunctive relief. The voluntary payment doctrine prevents a person from recovering money that he or she has voluntarily paid with full knowledge of all the facts and without any hint of fraud, duress, or extortion. Applying the doctrine to the facts of this case, the court held that it did bar recovery of those late fees the customers previously paid without protest. The court decided that the fact that the customers did not know that the actual costs to Time Warner were much lower than the \$5 late payment fee should be likened to a mistake of law, not a mistake of fact. The court held that since no fraud, duress, or mistake of fact occurred, the customers' claims for repayment were precluded by their previous failure to object to the late-payment fees prior to their payment. With respect to the claims for declaratory and injunctive relief claims, the court held

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28. 649 N.W.2d 626 (Wis. 2002).

that the claims were ripe for judicial determination because Time Warner's future imposition of late fees was an imminent and practical certainty. As such, the court remanded the issue of whether to give the customers declaratory and injunctive relief to the circuit court for further proceedings.

### 3. *Intellectual Property Law*

Cable and satellite companies own copyrights to their television programming. Individuals who violate the copyright by stealing the programming may be prosecuted under federal laws such as the Federal Communications Act<sup>29</sup> or the Electronic Communications Privacy Act.<sup>30</sup> The following two cases deal with issues surrounding the unauthorized interception of television programming.

#### *DirecTV v. Tasche*<sup>31</sup>

DirecTV, with the assistance of U.S. Marshalls, executed Writs of Seizure upon an internet seller of devices that were used for the unauthorized interception of DirecTV's programming. The company's records were seized, which showed that Randall Tasche purchased twenty signal theft devices from the online store. DirecTV alleges that Tasche purchased and resold the devices and that he knowingly and willfully conspired with others to defraud DirecTV. DirecTV filed an action asserting six claims under three federal statutes. Tasche challenged DirecTV's standing to assert two claims brought under the Federal Communications Act<sup>32</sup> (FCA) and the Electronic Communications Privacy Act (Wiretap Laws).<sup>33</sup> Tasche filed a motion to dismiss those two claims alleging that they were based on criminal statutes, and DirecTV could not assert a private right under them. The district court disagreed with Tasche. The FCA gave standing to DirecTV because it had proprietary rights in the intercepted communications, and Tasche sold devices that were intended to illegally intercept programming. With respect to the Wiretap Laws, Tasche argued that DirecTV could sue only those who directly intercept, disclose, or intentionally use the interceptor devices, not the "retailer" of those devices. However, the court adopted the majority view and interpreted the laws to broadly grant standing to anyone who knew and intended that the customers would intercept programming. Thus, the court

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29. 47 U.S.C. § 605 (2006).

30. 18 U.S.C. § 2510 (2006).

31. 316 F. Supp. 2d 783 (E.D. Wis. 2004).

32. 47 U.S.C. § 605 (2006).

33. 18 U.S.C. § 2510 (2006).

denied Tasche's motion to dismiss the two claims.

*DirecTV v. Valenti*<sup>34</sup>

Time Warner filed a motion for summary judgment to permanently enjoin the defendant, James Valenti, from illegally receiving its satellite transmissions. Time Warner claimed it was entitled to statutory damages, a permanent injunction, and attorney's fees and costs against Valenti. Valenti failed to respond to the motion within the required thirty-day period. As a result, the court concluded that there was no genuine issue of material fact as to the proposed findings of fact set forth by DirecTV in its motion. The court concluded that the facts demonstrated that Valenti violated the Wire and Electronic Communications Interception Act.<sup>35</sup> The court awarded DirecTV statutory damages, injunctive relief, and attorney's fees and costs. The court granted DirecTV a permanent injunction restraining Valenti from receiving, assisting others to receive, or advertising a device to receive DirecTV's satellite transmissions of television programming without authorization and payment.

*4. Antitrust Law*

Antitrust law can apply whenever the interests of consumers are jeopardized because of anticompetitive activities in the market. The only Wisconsin case dealing with antitrust law's impact on the television industry involves allegations that a television network located in California was violating federal and Wisconsin antitrust law.

*Lerma v. Univision Commc'ns, Inc.*<sup>36</sup>

The plaintiffs initially filed an action with the Milwaukee County Circuit Court seeking to prevent Univision from terminating plaintiffs' W46AR Channel 46 over-the-air broadcast of Univision's Spanish-language network programming at the end of their agreement and switching to direct cable network programming. The basis of the complaint was that such a switch violated the Sherman Act<sup>37</sup> and Wisconsin's antitrust laws.<sup>38</sup>

Univision removed the case to federal court on the basis of diversity

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34. No. 03-C-1327, 2005 U.S. Dist. LEXIS 14738 (E.D. Wis. May 19, 2005).

35. 18 U.S.C. § 2511(1)(a) (2006).

36. 52 F. Supp. 2d 1011 (E.D. Wis. 1999).

37. 15 U.S.C. § 2 (2006).

38. WIS. STAT. § 133.03(2) (2006).

jurisdiction. Two of the plaintiffs, Roman Lerma and Mario Omar, contested the removal to federal courts since they were citizens of California and Univision was headquartered in California. The court held that while it was true that diversity must be complete for subject matter jurisdiction to exist, plaintiffs could not avoid diversity jurisdiction by fraudulently joining non-diverse parties, as Univision had alleged. Univision had the burden of proving fraudulent joinder of Lerma and Omar and had to show that plaintiffs could not establish a cause of action against Univision. The court looked to the allegations in the complaint to determine whether the plaintiffs could establish a cause of action under Wisconsin's antitrust law. Univision argued that plaintiffs could not establish an antitrust injury under the facts of the case. The court agreed with Univision that, while the alleged illegal conduct by Univision may have injured the plaintiffs, it remained to be seen whether the switch to cable is anticompetitive conduct. As such, the plaintiffs' injuries were not antitrust injuries. Since the claims failed to assert any form of anticompetitive conduct on the part of Univision, the court held that Univision met its burden. Removal was thus proper, and the claims were dismissed.

### 5. *Unfair Trade Practices*

Conduct that is deemed to be an unfair trade practice is similar to an antitrust violation in that the conduct creates an unfair advantage in the market place. The following case involved a situation where the Wisconsin courts had to determine whether federal consumer protection laws preempted Wisconsin's unfair trade practice laws with respect to cable television programming.

#### *Time Warner Cable v. Doyle*<sup>39</sup>

After the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act)<sup>40</sup> became effective, Time Warner's service was restructured to remove certain channels from its basic and standard services. Time Warner subsequently offered those channels as options to receive "a la carte" for an extra premium each month. After the restructuring, all Time Warner subscribers were still able to receive the same number of channels for the same price. The Wisconsin Attorney General, Doyle, brought an administrative action before the Wisconsin Department of Agriculture, Trade and Consumer Protection. Doyle charged Time Warner with violating Wisconsin's unfair

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39. 847 F. Supp. 635 (W.D. Wis. 1994).

40. 47 U.S.C.S. § 609 (2006).



trade practice law<sup>41</sup> for its practice of charging for a package of “a la carte” channels without obtaining an order requesting these channels by name. Doyle claimed Time Warner engaged in “negative option billing,” which is an unfair trade practice under section 100.20. Time Warner sought to enjoin Doyle’s action, claiming that federal law precludes the application of state law.

The court held that the state’s regulation over negative billing did not conflict with the Cable Act or any other federal regulation. The court reasoned that the Cable Act clearly forbade cable operators from charging subscribers for services that the subscribers had not affirmatively requested by name, despite an FCC regulation that seemed to carve out an exception allowing cable operators to engage in negative billing in situations involving the addition or deletion of specific channels from an existing tier of service. Thus, the court decided that it would not give deference to the FCC regulation. The court denied Time Warner’s motion for summary judgment and entered judgment for Doyle.

*Time Warner Cable v. Doyle*<sup>42</sup>

On appeal, the Seventh Circuit reversed the district court’s decision. The court determined that the Cable Act was ambiguous, and thus, the FCC’s regulation that conflicted with Wisconsin’s law had to be given full deference from courts under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>43</sup> Since the FCC regulation was a permissible interpretation of the congressional authority given to it by the Cable Act, it shielded Time Warner’s billing practice from the scope of Wisconsin’s unfair trade practices statute.<sup>44</sup>

6. *Property Law*

There have been only a few Wisconsin entertainment industry cases involving property law. The following three cases pertain to the zoning and land use issues that television stations have had with cities and municipalities regarding the construction and maintenance of television antennas.

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41. WIS. STAT. § 100.20 (2006).

42. 66 F.3d 867 (7th Cir. 1995).

43. 467 U.S. 837 (1984).

44. WIS. STAT. § 100.20 (2006).

*State ex. rel. v. Seyberth*<sup>45</sup>

The State of Wisconsin brought an action against the members of the State Conservation Commission of Wisconsin (Commission), the members of the State of Wisconsin Radio Council (Radio Council), and the Wisconsin Valley Television Corporation (TV Corporation). The State sought a judgment declaring an agreement that all three defendants entered in to be *ultra vires* and void. The TV Corporation entered into a lease with the Commission for land sitting atop Rib Mountain, one of the highest locations in Wisconsin and a state park location, so that the TV Corporation could erect, maintain, and operate a television-radio tower and a television transmission building. The tower was a total of 648 feet in height. Under the agreement, all communications facilities on the property would be transferred to the one tower that was being constructed.

The State argued that the lease was in violation of article XI of the Wisconsin Constitution<sup>46</sup> because that provision restricted the power of the legislature to authorize a lease of state park lands and because such restrictions, in particular the lease of the land for park purposes, had not been complied with. The defendants moved for summary judgment, which the circuit court denied. On appeal the Supreme Court of Wisconsin held that the small amount of land involved did not interfere with the enjoyment of the park by the public and noted that a radio tower already existed on the property. The court pointed out that nothing in the Wisconsin statute, which granted the leasing power to the Commission<sup>47</sup> restricted the leasing power to park purposes. The court held that the public derived benefits from the lease, including improved police radio communications and improved television reception to residents.

*Beardsley v. City of Darlington*<sup>48</sup>

The City of Darlington authorized the expenditure of taxpayers' money for the purpose of erecting and maintaining a television-translator station. Beardsley, a taxpayer, contended that using taxpayers' money for the construction and maintenance of a television-translator station violated the federal and state constitutions, including the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution.<sup>49</sup> The circuit court ruled in favor of

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45. 101 N.W.2d 118 (Wis. 1960).

46. WIS. CONST. art. XI, § 3(a).

47. WIS. STAT. § 27.01(2)(g) (2006).

48. 111 N.W.2d 184 (Wis. 1961).

49. U.S. CONST. amends. IV, V, XIV.

Darlington. On appeal, the Supreme Court of Wisconsin affirmed the circuit court's decision. The court could not see how the constitutional provisions provided by Beardsley related to the city's proposal to erect a municipal television-translator station. The court found nothing in the Wisconsin Constitution prohibiting the legislature from granting authority to cities to undertake such projects provided the expenditure was for a legitimate public purpose. The court held that improving the quality of television service in communities where reception was limited and inferior, served a legitimate public purpose. There was also nothing in the State of Wisconsin's statute governing municipalities<sup>50</sup> that prohibited the city's erection of the translator. As such, the means that Darlington used to improve the quality of television reception were permissible in the promotion of public health, safety, and welfare.

*Hearst-Argyle Stations, Inc. v. Bd. of Zoning*<sup>51</sup>

The FCC issued a directive requiring all television stations to begin broadcasting DTV signals to its broadcast areas by May 1, 2002. In deciding to comply with the FCC's directive by top-mounting the DTV antenna, WISN-TV Channel 12 (the station) petitioned BOZA for a special use and variance permit, which would give the station permission to construct an addition to its existing tower for the purpose of mounting a DTV antenna on top of the existing analog antenna. The tower's current height was 1106 feet, and with the addition, the tower's height would increase by 116 feet for a total height of 1222 feet. The Board of Zoning Appeals for the City of Milwaukee (BOZA) determined that the increase was not necessary for the "public convenience," which was one of the then-existing special use permit requirements. BOZA argued that the tower extension was not necessary since a side-mounted DTV antenna on its own tower could be temporarily set up until the analog antenna could be removed. As such, BOZA denied the station's zoning permit application.

The station commenced two actions, seeking both mandamus and certiorari relief. The circuit court affirmed the decision of BOZA. On appeal, the station argued that by side-mounting the DTV antenna on the station's present tower, the station would lose about 3000 viewers within the City of Milwaukee. The Supreme Court of Wisconsin held that the loss was not so great as to create a "public inconvenience" such that top-mounting rather than side-mounting was necessary for the public convenience. BOZA's decision

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50. WIS. STAT. § 62 (2006).

51. 659 N.W.2d 424 (Wis. Ct. App. 2003).

was thus not arbitrary, oppressive, or unreasonable since the station could still reach 99.5% of the viewing area. The court affirmed the circuit court's judgment.

#### IV. MUSIC

The music industry is another part of the entertainment industry that has seen issues litigated in Wisconsin courts. The focus of most of the cases involving musical recordings is intellectual property law, namely copyright infringement. The cases usually involve the owner of a copyright enforcing its right to prevent violators from illegally playing or selling the music. However, contractual and employment disputes can arise in the musical arena as well, as the following Wisconsin cases exhibit.

##### *1. Contract Law*

Contracts are very important in the music industry because most production of music relies on contractual relationships between parties, such as artists and the record companies that produce the music. Only one contract case involving music has been litigated in Wisconsin. The case involved a contractual dispute between a music festival and a talent agency.

##### *Grenier & Moore Prod., Inc. v. Chippewa Valley County Festival, Inc.*<sup>52</sup>

Chippewa Valley (CVCF) sponsored three music festivals in 1994 and hired Grenier & Moore (agency) to act as a talent buyer for the festivals. The two parties entered into a written agreement, with the terms being that the agency would act "only as the entertainment negotiator." The terms of the contracts with the entertainers were set out in written contracts between the agency and the festival. After entering into the contract, CVCF wanted to change provisions of the contracts between it and the entertainers. CVCF tried to get the entertainers to sign addendums changing the contracts. The agency, on behalf of CVCF, also attempted to get the entertainers to agree to the changes and sign the addendums. Some of the entertainers refused to sign the addendums. CVCF then decided not to pay the agency's commission, and the agency sued for breach of contract. CVCF counterclaimed for breach of fiduciary duty.

The circuit court found that the CVCF did breach the contract, and the agency did not breach its fiduciary duty. The court of appeals affirmed the circuit court's decision, holding that no evidence supported CVCF's argument

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52. 546 N.W.2d 580 (Wis. Ct. App. 1996).

that the agency, by saying it would attempt to get the entertainers to sign the addendums, constituted an oral agreement to make the changes requested by CVCF. The agency merely had a duty to negotiate, not to guarantee the results of the negotiation. The court also found that for the agency to forfeit its commission under breach of fiduciary duty principles, a finding of “gross mismanagement, gross misconduct, gross unskillfulness, or unfaithfulness”<sup>53</sup> would have to occur. There was no evidence presented to prove any of these standards.

## 2. Tort Law

Torts claims could also be important in music because so many parties rely on each other in the production of music; however, Wisconsin has only seen one tort case in this area. The case pertained to a legal malpractice lawsuit arising out of a dispute between a rock band and its personal manager over the ownership of certain musical recordings.

### *McCraw v. Mensch*<sup>54</sup>

McCraw, a resident of Wisconsin, was the personal manager of the rock band the BoDeans from about 1986-2003. He formed a music publishing company, Lla-Mann, with the members of the BoDeans for the purpose of owning the copyrights of all the BoDeans’ songs. Mensch, an entertainment law attorney and member of the Illinois Bar, represented McCraw on various business affairs including the formation of Lla-Mann. The BoDeans fired McCraw in 2003, which created a dispute as to who owned the copyrighted material formed under the Lla-Mann company. The band ended up suing McCraw over ownership of the songs, and McCraw lost. McCraw then sued Mensch in a Wisconsin Circuit Court alleging negligence, strict responsibility misrepresentation, and negligent misrepresentation. Mensch filed a motion to transfer venue to the U.S. District Court for the Eastern District of Wisconsin. The court granted Mensch’s motion after looking at the relevant factors: convenience of the parties, convenience of the witnesses, and the interest of justice.

## 3. Intellectual Property Law

Musicians and producers rely heavily on the income generated from owning the copyrights to their musical recordings. As such, copyright owners

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53. *Id.*

54. No. 06-C-0086, 2006 U.S. Dist. LEXIS 11683 (W.D. Wis. Mar. 17, 2006).

vigorously enforce their copyrights, as the following Wisconsin cases show.

*Leo Feist, Inc. v. Young*<sup>55</sup>

Leo Feist, Inc. was formed to represent composers, enforce copyrights owned by composers, and collect royalties. One representative of Leo Feist was located in Wisconsin to demand and collect royalties from any copyright violators in that state. The defendants operated taverns all across Wisconsin and played music for the enjoyment of their guests. Feist sued the taverns under the Copyright Act<sup>56</sup> to collect royalties allegedly due for the playing of copyrighted music. The taverns countersued, asking for injunctive relief to prevent Feist from interfering with their playing of music. The court dismissed both parties' claims. The court held that the taverns were not entitled to relief because they were not being forced to operate taverns or to play music, and they were violating federal copyright laws. The court dismissed Feist's claim because at no time did the association file for and obtain a license to represent composers in Wisconsin nor did it pay a franchise tax on receipts obtained in Wisconsin, all of which was required by then existing Wisconsin law. Thus, the representative of Feist was in contravention of Wisconsin law, and the court would not let Feist collect royalties. Feist argued that the statute violated equal protection by its classification of Feist because it did not bear a reasonable relationship to a legitimate governmental purpose. The court determined that the statute in question did not violate the U.S. Constitution.

*Leo Feist, Inc. v. Young*<sup>57</sup>

On appeal, the Seventh Circuit held that Feist's noncompliance with Wisconsin law did not preclude federal copyright infringement suits because Feist had a valid copyright that was protected under general equitable principles and the Copyright Act itself. The Wisconsin statute was not relevant or material to the copyright infringement action. Thus, the judgment dismissing Feist's action was reversed.

*Mercury Record Prod., Inc. v. Econ. Consultants, Inc.*<sup>58</sup>

Mercury and eight other record companies brought suit against Economic

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55. 46 F. Supp. 622 (E.D. Wis. 1942).

56. 17 U.S.C. § 25 (2006).

57. 138 F.2d 972 (7th Cir. 1943).

58. 218 N.W.2d 705 (Wis. 1974).

Consultants alleging unfair competition due to Economic Consultants' copying of music recordings produced by the record companies. The record companies sought a temporary injunction from the circuit court, and Economic Consultants filed a motion to dismiss for failure to state a claim upon which relief could be granted. The circuit court sustained Economic Consultants' demurrer. The record companies appealed, arguing that they had a cause of action for misappropriation under common law unfair competition principles.<sup>59</sup> Economic Consultants argued that misappropriation did not apply because (1) states could not constitutionally regulate record piracy by common law; (2) misappropriation claims as applied in this case have been severely restricted; (3) after the record companies sold the records, they had no property interest in the music to protect; (4) re-release of old songs by the record companies after a certain date subjected those songs to federal protection and removed them from state protection, and (5) the courts should defer to Congress with respect to controlling music piracy.

Congress had not acted or devised a scheme that applied to the subject matter of this action. Therefore, the court held that states could regulate music piracy by statute and common law. Congress's failure to preempt the area of record piracy subjected the actions of Economic Consultants to state unfair competition law; therefore, the Wisconsin Supreme Court reversed and remanded the circuit court's order with direction to reconsider the question of granting a temporary injunction.

*Cayman Music, Ltd. v. Reichenberger*<sup>60</sup>

Reichenberger gave a public performance of a copyrighted composition. Cayman Music brought a civil action for injunctive relief and monetary damages against Reichenberger, alleging infringement of a copyright that belonged to Cayman. Cayman brought the suit under the Copyright Act.<sup>61</sup> Reichenberger moved for a trial by jury, and Cayman moved to strike the motion. The issue in the case was how the court should rule on the motion. Cayman asserted that its action was solely for injunctive relief and that the damages requested were for only the minimum statutory amount; therefore, Reichenberger had no right to a jury trial on any of the issues. Reichenberger asserted that since Cayman was asking for monetary damages, it raised a legal

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59. The elements of a misappropriation cause of action, which were developed in *International News Services v. Associated Press* are: (1) time, labor, and money expended in the creation of the thing misappropriated; (2) competition; and (3) commercial damage to the plaintiff. 248 U.S. 215 (1918).

60. 403 F. Supp. 794 (W.D. Wis. 1975).

61. 17 U.S.C. § 101 (2006).

issue suitable for a jury trial. The court held that a jury trial was not required under the Act when the relief sought was limited to a request for injunctive relief and for minimum statutory damages. The remedy sought by Cayman was equitable in nature and was not for compensation or punitive damages. The court granted Cayman's motion to strike the demand for a jury trial.

*George Simon, Inc. v. Spatz*<sup>62</sup>

The plaintiffs were music publishers and members of the American Society of Composers, Authors, and Publishers (ASCAP), which was a musical professional society. Each of the plaintiffs granted to the ASCAP a non-exclusive right to license public performances for profit of each of their copyrighted musical recordings. ASCAP, on behalf of its members, licensed radio stations, television stations, night clubs, restaurants, and others places who wanted to publicly perform the copyrighted compositions in ASCAP's "library." Spatz owned the Green Bough Lounge, and he provided live performances of plaintiffs' copyrighted compositions while refusing to obtain a license with ASCAP. Plaintiffs filed consolidated civil actions for monetary and injunctive relief based on copyright infringement,<sup>63</sup> and they moved for summary judgment. Spatz did not deny the allegations; however, he argued that plaintiffs were unable to demonstrate that the works played were exactly the same as those copyrighted. The court did not accept Spatz's argument, holding that plaintiffs merely needed to prove that their works were performed, not that the exhibitions at Spatz's lounge were identical to the copyrighted works. Since the works were held out to be performances of the copyrighted compositions, the degree of similarity to the original was irrelevant.

*Cass County Music Co. v. Muedini*<sup>64</sup>

The plaintiffs were owners of copyrights to various songs. Muedini owned the Port Town Restaurant. Muedini played music from a Milwaukee radio station while patrons were dining. One day in 1992, the plaintiffs sent an investigator to determine if copyrighted music was being played. The investigator noted that six songs that the plaintiffs owned copyrights to were

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62. 492 F. Supp. 836 (W.D. Wis. 1980).

63. 17 U.S.C. § 501(a) (2006) (provides that anyone who violates any of the exclusive rights of the copyright owner is an infringer of the copyright). 17 U.S.C. § 106 (2006) (provides that with respect to musical works, the copyright owner has exclusive rights to perform the copyrighted work publicly and to authorize the public performance of the copyrighted work).

64. 821 F. Supp. 1278 (E.D. Wis. 1993).



played on the radio station at the restaurant. Plaintiffs filed suit alleging that the “public performance” of copyrighted musical compositions constituted copyright infringement under the Copyright Act,<sup>65</sup> which provides that copyright owners hold the exclusive right to control public performances of their works. Plaintiffs sought \$1000 in damages for each of the six songs played over the radio at the restaurant, an injunction, costs, and attorneys fees. Muedini failed to respond to the suit, and plaintiffs filed a motion for a default judgment. The court refused to grant the motion, holding that Muedini’s actions were exempt under another provision of the Copyright Act.<sup>66</sup> The exemption applied to this case because the restaurant did not charge a fee to hear the radio broadcast and the transmission of the musical performances were made through a single radio player commonly used in private homes.

*Cass County Music Co. v. Muedini*<sup>67</sup>

On appeal, the plaintiffs claimed the district court erred in finding that Muedini’s receiving apparatus was the kind commonly used in a private home. The restaurant’s sound system used a “Realistic” brand receiver, which was sold for \$200 at a Radio Shack. The sound system also used a separate control panel containing five selector switches and nine speakers, each with eight-inch loudspeakers contained in them. A transformer was also used to increase the wattage going to all the speakers. Considering the entire system, the court reversed the district court’s decision. The court found that Muedini’s audio system was not composed of only home-type components, and was not configured in a manner commonly found in a home. As such, the court held that Muedini was not statutorily exempt from the Copyright Act under section 110(5).

*4. Employment Law*

Employment law issues are relevant in music. In the music industry the question of who is an employee often arises, because many people in the industry operate as independent contractors. The following case considers whether musical entertainers who obtain their work from entertainment agencies are employees of the agency.

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65. 17 U.S.C. § 106(4) (2006).

66. 17 U.S.C. § 110(5) (2006).

67. 55 F.3d 263 (7th Cir. 1995).

*Foard v. Labor & Indus. Review Comm'n*<sup>68</sup>

Foard owned Les Artistes, a musical entertainment agency that placed musicians with clients seeking entertainment for social events. When a client requested musical entertainers for social events, Foard contacted the musicians, asked about their availability, and told them about the compensation. If the musicians were available and willing to perform services, then Foard provided details about the job's location and when to arrive. When the job was completed, Foard compensated the musicians. The issue in this case was whether the musicians were employees of Foard.

An administrative law judge found Foard was liable to the musicians for unemployment compensation distributions. The Labor and Industry Review Commission affirmed that decision. Foard brought the action to the Wisconsin state courts, and the circuit court reversed the Commission's decision, stating that the musicians were not Foard's employees under Wisconsin law.<sup>69</sup> The Commission appealed the circuit court's decision, and the Court of Appeals of Wisconsin affirmed. Since the musicians performed services for pay, the court had to determine whether the Foard was exempted from paying unemployment compensation by the provisions of the Wisconsin Act.<sup>70</sup> The court first found that the musicians were free from Foard's control or direction over the performance of their services under their contracts. The court also found that the musicians performed their services in an independently established profession in which they were customarily engaged. No evidence existed that the musicians were economically dependent on Foard. Therefore, the court held that the musicians were actually independent contractors and not employees of Foard.

## V. RADIO

Some of the oldest cases in the entertainment law field come from disputes involving radio. These are some of the oldest cases because radio predates many of the other entertainment industries. These disputes include tort cases, contract cases, intellectual property cases, and property cases.

### 1. Tort Law

Most tort cases involving radio are cases of defamation. Even though there is not much statutory law involving radio, there is a statute on defamation for

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68. No. 94-2889, 1995 Wisc. App. LEXIS 997 (Wis. Ct. App. Aug. 16, 1996).

69. WIS. STAT. § 108.02(12) (2006).

70. *Id.* § 108.02(12)(b).

both television and radio.<sup>71</sup> The statute states that a radio station cannot be held liable for defamatory statements made by a candidate if the network cannot sensor the script of the broadcast;<sup>72</sup> however, there is no case law interpreting or applying the statute. In general, courts are reluctant to find defamation because they do not want to prevent the media from being able to fully exercise its First Amendment<sup>73</sup> rights.

*Singler v. Journal Co.*<sup>74</sup>

Singler was the president of the Wisconsin Co-operative Milk Pool, a group of over 8000 dairy farmers who had a dispute with how large dairy companies distributed milk. The co-op members and officials decided to withhold their product until a "fair price" was paid. During the production strike, Singler was referred to as a racketeer and compared to Chicago gangsters during a Journal Company radio broadcast. Singler brought a defamation suit against the Journal Company. The jury found the statements were not defamatory, and Singler appealed.

The Supreme Court of Wisconsin noted that the issue was one for a jury to determine, and the jury was entitled to determine that the comments broadcast on the defendant's station did not amount to defamation. The court also noted that it examined the jury instructions and the lower court's rejection of evidence did not constitute a prejudicial error.

*Giwocky v. Journal Co.*<sup>75</sup>

Giwocky was a landlord whose name was mentioned during a series of radio and television broadcasts discussing "absentee landlords." Giwocky claimed his business and reputation were damaged because of one of the broadcasts. Although he claimed the information in the broadcast was not false, he claimed it was "grossly misleading." Giwocky claimed that the broadcast showed a property that was not his at the time of the report. He also claimed that the broadcast implied that he sold his properties to evade federal rent control. Finally, Giwocky contended that he was defamed by the entire series because there was enough of a bridge between the broadcasts to implicitly refer to him. The circuit court granted judgment for the plaintiff, and the defendant appealed.

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71. WIS. STAT. § 895.052 (2006).

72. *Id.*

73. WIS. CONST. art. I, § 3.

74. 260 N.W. 431 (Wis. 1935).

75. 237 N.W.2d 36 (Wis. 1976).

The Supreme Court of Wisconsin reversed the circuit court's decision and remanded the case with an order for summary judgment on behalf of the defendant. The court found that the broadcast that mentioned the plaintiff was not defamatory and that "an ordinary person with an ordinary mind" would not understand it to defame him. The court noted that the other broadcasts were not defamatory because he was not referenced in or linked to the other broadcasts.

*Lewis v. Coursolle Broad.*<sup>76</sup>

James R. Lewis was a former state legislator who resigned from public office after being convicted of perjury and sentenced to six months in prison. After being released, he petitioned the court to vacate the conviction. As a result of his effort to vacate the conviction, information presented to the grand jury about Lewis's illegal activity became public. The newspapers then published the information. Two years later, a radio broadcast confused James W. Lewis, who was attempting to extort the makers of Tylenol, with James R. Lewis. The broadcast mistakenly described James R. Lewis's background as state legislator when discussing James W. Lewis's efforts to extort Tylenol. After learning about its mistake, the station broadcast retractions that day and the following day. Lewis filed a claim of defamation, and the circuit court granted summary judgment to the broadcaster.

In affirming the circuit court's decision, the Supreme Court of Wisconsin noted that a court, and not a jury, must determine if a person was a "public figure" for a defamation case. The court held that when a defamation action is brought against the media there is a higher standard of proof for public figures. Lewis argued he was not a public figure since he had been out of office for three years when the broadcast occurred. The court determined that he was a public figure, and there was a public interest in information about him. The court also found that in his attempt to vacate his conviction, he kept himself as a public figure. The court, relying on earlier U.S. Supreme Court opinions that required public figures to prove actual malice in defamation cases, noted that Lewis needed to show there was "actual malice" on the part of the broadcast. Lewis was unable to show actual malice because failure to investigate the accuracy of information would not qualify as actual malice.

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76. 377 N.W.2d 166 (Wis. 1985).

## 2. Contract Law

Contract law is an important area of the law that has a significant impact on the radio industry. As in many industries, employment contracts are an important part of the contract case law for that industry. The following two cases involve employment contract disputes between radio employees and station owners.

### *Journal Co. v. Bundy*<sup>77</sup>

Bundy had a musical-variety radio show using the nickname "Heinie" in Detroit. He contacted WTMJ, operated by the Journal Company, to produce a similar show. The parties entered into a written contract, which prohibited Bundy from using the nickname in the Milwaukee area for sixty days after the expiration of the contract. That contract expired four years later. Bundy terminated his employment after eleven years to go to New York. Throughout the time Bundy's show ran on WTMJ, he used the phrase "Band of Million Friends." Several years later Bundy returned to the Milwaukee area and broadcast a show on WMAW using the phrase "Heinie and His Band – the Band of Million Airmen" for advertising purposes. The Journal Company sought to prevent Bundy from using "Heinie" and "Band of Million Airmen." The lower court restrained Bundy from using the "Band of Million Airmen" because it was confusingly similar to the "Band of Million Friends." However, because Bundy had been known professionally as "Heinie" and because the Journal Company could not show that it would face irreparable harm if Bundy continued to use the nickname "Heinie," the lower court denied the Journal Company's request to prevent him from using the name.

The Supreme Court of Wisconsin affirmed the lower court's decision because there was not an abuse of discretion. The court also found that there was not a "great weight and preponderance of the evidence" to support the decision.

### *Augustine v. Anti-Defamation League of B'nai B'rith*<sup>78</sup>

Augustine was an employee of a Milwaukee radio station. He was fired because he failed to delete a guest's racist comments from a broadcast and failed to play the disclaimer stating that the views of the guests were not the views of the station and its management. The station received numerous complaints about the broadcast, one of which was from the Anti-Defamation

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77. 37 N.W.2d 89 (Wis. 1949).

78. 249 N.W.2d 547 (Wis. 1977).

League (ADL). Augustine then filed a suit against the ADL and the general manager of the radio station, claiming that firing him violated Wisconsin's Fair Employment Act, that the ADL complaint interfered with his contract, and that there was a conspiracy between the defendants. The lower court granted summary judgment for the ADL, and Augustine appealed.

The Supreme Court of Wisconsin held that there was no discrimination by the ADL and that the guest's philosophy was not protected under the Fair Employment Act under the definition of "creed." Under the Fair Employment Act, a person could not be fired for his or her creed. The court then turned to Webster's Dictionary to define creed as "a system of religion or religious faith," and not political philosophy. The court determined that the ADL's call was not intended to interfere with Augustine's contract, and there were twenty to thirty other calls complaining about the broadcast as well. Finally, Augustine could not prove there was a conspiracy. The lower court's judgment was affirmed.

### 3. Intellectual Property Law

Intellectual property rights are especially important in the radio industry. As the *Journal Co. v. Bundy*<sup>79</sup> case showed, trademarks are important in identifying people on the radio because they are recognized only by their nicknames and voices. Trademarks can also be used to identify radio stations themselves.

The federal courts and Wisconsin state courts apply a "likelihood of confusion" standard in determining whether there is trademark infringement. The following two cases demonstrate how the courts have applied this standard to radio trademarks in Wisconsin.

#### *M.B.H. Enters., Inc. v. WOKY, Inc.*<sup>80</sup>

M.B.H. was a Colorado company that registered the service mark "I love you" for "entertainment services in the nature of radio programs and personal appearances by a disc jockey." Thirty radio stations licensed its promotion, including WISN, which broadcast "I Love you Milwaukee" 180 times a week. The station also sold t-shirts and glassware with the slogan. WISN used the promotion for over two years, but cancelled it after a rival radio station used "WOKY loves Milwaukee" and used the "loves Milwaukee" with various disc jockey names. WOKY's slogan was also found

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79. 37 N.W.2d 89 (Wis. 1949).

80. 633 F.2d 50 (7th Cir. 1980).

on billboards and bumper stickers. M.B.H sued WOKY, seeking an injunction and damages for trademark infringement, trademark disparagement, and unfair competition. The district court granted summary judgment for WOKY. M.B.H appealed on the issue of infringement.

The Seventh Circuit affirmed the district court's decision. When analyzing whether there was a case of infringement, the Seventh Circuit considered whether WOKY's use of the slogan was intended to be a service mark. The court held that the phrase was not being used as a service mark, but instead to describe its services. Furthermore, the court found that the words themselves were descriptive, not fanciful or arbitrary, and not intended to function as a service mark. The court also found that there was no likelihood of confusion that consumers would confuse the slogan for a service mark, or be confused by the slogan because the station included its call letters.

*Bartell Broadcasters, Inc. v. Milwaukee Broad. Co.*<sup>81</sup>

Bartell Broadcasters (Bartell) broadcasted a radio program called "Mad Man Michaels Program" for seven years, when the defendant Milwaukee Broadcasting Company (MBC), a rival broadcasting company, began running advertisements that "Mad Man Michaels is back." The defendant's program was set to air during approximately the same hours as Bartell's programming, and Bartell claimed that MBC used advertising designed to confuse and mislead listeners. However, the disc jockey who was known as "Mad Man Michaels," "The Mad One," and "The Mad Man," was no longer employed by the plaintiff and had become employed by the defendant. The plaintiffs sought a temporary injunction to prevent the defendant from using "Mad Man Michaels," and the circuit court denied the injunction.

The circuit court determined that the plaintiff did not clearly demonstrate the necessity of the injunction. The Supreme Court of Wisconsin affirmed the circuit court's denial of the temporary injunction because the court did not find that the circuit court abused its discretion.

#### *4. Property Law*

Property law has less significance in radio than some of the other entertainment fields; however, because zoning laws regulate what specific land can be used for, it is relevant to radio. If the land is designated to be used for a specific purpose, it has to be used for that purpose. Zoning law issues in radio often relate to construction of a radio tower at a specific location. The

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81. 108 N.W.2d 129 (Wis. 1961).

following case is the only reported Wisconsin case that involved this type of dispute.

*Bd. of Regents v. Dane County Bd. of Adjustment*<sup>82</sup>

A landowner applied for a conditional use permit for the construction of a radio tower, which he intended to lease to the University of Wisconsin. The University of Wisconsin would have been responsible for building and operating the student-run tower. The Zoning and Natural Resources Committee found that the radio tower would qualify as government use and granted a conditional use permit. The Board of Adjustment (BOA) determined it was not a government use because it was not “an integral part of [the] educational mission” of the university. The Board of Regents of the University of Wisconsin filed a complaint in the circuit court, and the court reversed the BOA decision stating that it overstepped its jurisdiction without evidence supporting its decision. The BOA appealed.

Because the court of appeals determined that this case would impact other counties, it decided to review the case *de novo*. The court determined that “government use” would allow the government to determine how to use the land within the statutory constraints. Because the radio would be paid for by student fees and allocated funds, would be run by students and faculty, and would be implemented as a teaching tool, the court determined that the tower fell under the category of “government use” and affirmed the circuit court’s decision.

## VI. ART, PUBLISHING, & PERFORMANCE

Art, publishing, and performance is a large part of the entertainment industry because it encompasses so many things, including books, book stores, newspapers, magazines, paintings, and dance. With so many different topics, there are a variety of cases that arise out of this category. There is a substantial amount of case law in this area, spanning throughout the twentieth century.

### *1. Tort Law*

All of the tort cases involving art, publishing, and performance are cases of defamation. The Wisconsin cases that have been litigated in this area have dealt with publishing, not art or performance. Because these cases involve written publication, they involve a number of allegations of libel. The

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82. 618 N.W.2d 537 (Wis. Ct. App. 2000).



defamation standards are the same in this area as those already discussed. There must be "actual malice" for there to be defamation of a public figure. Generally, courts give the media some level of deference because they fear chilling the free speech rights of the media.

*Robinson v. Eau Claire Book & Stationery Co.*<sup>83</sup>

The plaintiff and the defendants published different Eau Claire directories. The defendants allegedly published articles in two newspapers and a circular accusing the plaintiff of being unscrupulous and scheming to steal the money of the residents of Eau Claire. However, the defendants denied that they were the parties that published the articles. A jury found that the articles were defamatory and awarded the plaintiff \$1500. The court then granted a motion for the defendants to set aside the verdict giving the plaintiff the option to take a reduced amount. He chose the option, and judgment was entered in his favor to which the defendants appealed.

The Supreme Court of Wisconsin reversed and remanded the lower court's decision. The court noted that the language used in the circular was libel per se, and the defendants did not have the right to publish an article that would harm the plaintiff's business. The court also noted that there was not enough evidence that the defendants published the articles that appeared in the newspapers, and because the defendants denied publishing the articles, the jury should not have been presented with the question of libel as to the newspapers.

*Newspapers, Inc. v. Breier*<sup>84</sup>

The plaintiff newspaper company, owner of the *Milwaukee Journal*, requested information on arrests, and Breier, the Chief of Police for the City of Milwaukee, agreed to provide information about people who had been taken into custody. The information submitted to the newspaper included the name, age, and date of birth of all persons taken into custody, as well as when they were arrested and who the arresting officer was. Breier would not disclose the charges or the names of any informants because of concerns that such disclosure would possibly cause personal or economic harm to individuals arrested. The newspaper wanted to know the charges brought against the arrested parties, and filed suit for declaratory judgment stating that it was entitled to such information. The trial court ruled in favor of the newspaper and ordered that the charges be disclosed within forty-eight hours of the arrest;

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83. 85 N.W. 983 (Wis. 1901).

84. 279 N.W.2d 179 (Wis. 1979).

however, the court gave the police the option to refuse to disclose certain arrests within the forty-eight-hour requirement as long they gave specific reasons for doing so.

Neither party was satisfied with the ruling. The newspaper appealed, arguing that it should be given immediate access to all information pursuant to Wisconsin law.<sup>85</sup> Breier also appealed, arguing that no charges should ever be disclosed. The Supreme Court of Wisconsin reversed the trial court's ruling and ordered Breier to provide daily arrest records to the newspaper and the public. The court held that arrest records, including the charges made, are considered public information pursuant to Wisconsin Statutes section 19.21. The court also found that the public's right to the information outweighed any privacy interests of the accused.

*Simonson v. United Press Int'l, Inc.*<sup>86</sup>

The United Press and Associated Press released several news dispatches on Judge Simonson's comments when sentencing a fifteen-year-old boy who pled "no contest" for a second-degree assault. The information about Simonson's statements in the dispatch came from a *Wisconsin State Journal* article "proposed" for publication, which was slightly different from the final published article. Simonson sued for libel, and the defendants filed a motion for summary judgment.

The court noted that although the words chosen in the news dispatches were provocative, they were substantially true and therefore protected from libel. The court further noted that because the judge was a public official and the case was a matter of public concern, even if the dispatches were false there would need to be actual malice for the plaintiff to be able to recover. Simonson was unable to show actual malice. Because the dispatches were substantially true and there was no proof of malice the court granted summary judgment for the defendants.

*Harris v. Quadracci*<sup>87</sup>

Lynnette Harris, a well known model and actress, and her twin sister were prosecuted for tax evasion in federal court in the Eastern District of Wisconsin. They were charged with willful failure to report money they received from an elderly widower as income. The sisters were convicted, but the Seventh Circuit reversed the convictions, holding that the money the

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85. WIS. STAT. § 19.21 (2006).

86. 500 F. Supp. 1261 (E.D. Wis. 1980).

87. 856 F. Supp. 513 (E.D. Wis. 1994).

sisters received was a gift, not taxable income. Before the convictions were reversed and while Harris was in jail, the media discovered the story, and a magazine article was printed about Harris. She claims that there were several defamatory statements made about her in the article.

Harris filed a defamation action against the magazine owner, its publisher, the writer, and Harris's biographer. The defendants moved for summary judgment. The court stated that Harris had to prove actual malice to recover damages on a defamation action against the media. Because of the considerable media coverage the tax case received and the numerous interviews Harris granted, she became a narrow purpose public figure. Therefore, she had to prove that the writer acted with the knowledge that the statements were false or acted with reckless disregard of whether they were false. Harris did not prove actual malice; thus, summary judgment was granted for the writer, the magazine owner, and the publisher. With respect to the biographer, summary judgment was also granted because none of the statements made by the biographer were defamatory.

*Harris v. Quadracci*<sup>88</sup>

On appeal, Harris claimed that the district court erred in concluding that she was a limited purpose public figure. The Seventh Circuit affirmed the district court's decision, stating that the magazine article was relevant to Harris's tax evasion controversy, which was of substantial public interest; therefore, Harris qualified as a limited purpose public figure.

*Milsap v. Journal/Sentinel, Inc.*<sup>89</sup>

The Journal Sentinel, which published the *Milwaukee Journal*, ran a story written by Gregory D. Stanford about the life and career of colleague Carol Malone after her death. The article accused James Milsap, who ran a training program and a facility that published a newspaper called *The Torch*, of not paying people he owed and noted that the highlight of Malone's career was running Milsap out of town. Milsap sued the Journal Sentinel, Stanford, the editor of the editorial page, and the head of the legal department for, among other claims, defamation. The district court held that the article was a statement of opinion and therefore not actionable. The court granted defendants' motion for summary judgment.

The U.S. Court of Appeals for the Seventh Circuit found that the

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88. 48 F.3d 247 (7th Cir. 1995).

89. 897 F. Supp. 406 (E.D. Wis. 1995), *rev'd in part*, 100 F.3d 1265 (7th Cir. 1996).

statement “he simply reneged on paying people” was actionable. The court further noted that because the statement could have affected Milsap’s business, there was an issue of fact as to whether there was defamation. However, the court determined that Milsap was a public figure, and thus, the defendant needed to have actual malice in making the statement. The question of whether there was actual malice was to be left for a jury to decide. Therefore, the court reversed and remanded the decision as to Stanford, but it affirmed the summary judgment as to the other parties.

*Torgerson v. Journal Sentinel, Inc.*<sup>90</sup>

Torgerson held public office as Wisconsin’s deputy commissioner of insurance. He was also half owner of a title insurance company. The *Milwaukee Journal* published an article accusing Torgerson of being unethical and violating conflict of interest restraints. The article was also reprinted in other newspapers. Torgerson sued for libel.

The trial court denied both parties’ motions for summary judgment. Both parties appealed, and the Court of Appeals of Wisconsin consolidated the cases. The court of appeals reversed the lower court’s decision as to the Journal and granted summary judgment on behalf of the Journal. The court held that there was no actual malice, which is required when a public official claims a newspaper published something that was false and defamatory. The court of appeals affirmed the decision to deny Torgerson summary judgment. Torgerson then appealed to the Supreme Court of Wisconsin, which affirmed the court of appeals’s decision because there was no evidence of actual malice.

*2. Contract Law*

In the area of art, publishing, and performance there are numerous types of contractual relationships, such as employment contracts, licensing contracts, and promotional contracts. In licensing contracts, an artist could contract with a third party in order to mass-distribute his or her art. A licensing contract was the basis for the single Wisconsin case in this category.

*Zoellick v. Unger*<sup>91</sup>

Zoellick, an artist, entered into a one-year agreement with Northwoods Craftman to reproduce, advertise, promote, and sell his art. Northwoods would pay Zoellick twenty-five percent of the wholesale prices, but according

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90. 563 N.W.2d 472 (Wis. 1997).

91. 551 N.W.2d 62 (Wis. Ct. App. 1996).

to the contract, the art prints were the property of Northwoods. The agreement would automatically renew unless either party provided written termination six months before the contract ended. Zoellick notified Northwoods in writing a full year in advance that he was terminating the contract for the following year. Six months later Northwoods sold the artwork to a third party. Zoellick sued to recover royalties, but the complaint was dismissed because the trial court found that there was not a "meeting of the minds" as to what would happen with the remaining inventory once a party terminated the contract. Zoellick appealed the decision.

The court of appeals noted that the contract was ambiguous as to what would occur with royalties when one party terminated the contract. Because the trial court found there was no meeting of the minds and the trial court's decision was not clearly erroneous, the court of appeals affirmed the trial court's judgment.

### 3. *Constitutional Law*

The largest body of Wisconsin case law involving art, publishing, and performance is in the area of constitutional law. Some of these cases concern the right of privacy under the Fourth Amendment;<sup>92</sup> however, the majority of the cases involve freedom of expression rights under the First Amendment.<sup>93</sup>

#### A. Right of Privacy

In many instances, the right to privacy conflicts with a newspaper's free speech rights because newspapers tend to report on subjects that are of concern to the public. The right to privacy would prevent information from being published in a newspaper because it would prevent newspapers from making certain information public knowledge. However, the courts are not willing to restrict the press when it is an issue of public interest.

#### *United States v. Peters*<sup>94</sup>

In a highly publicized criminal trial, the judge did not close voir dire to the public and the press. The *Milwaukee Sentinel* then published information about the first day of voir dire; however, names and background information about the prospective jurors were not reported. After the article was published, the defendants moved to close voir dire, and the court granted the defense's

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92. U.S. CONST. amend. IV.

93. U.S. CONST. amend. I.

94. 754 F.2d 753 (7th Cir. 1985).

motion and cleared the media and the public. There was also an order to prevent a reporter from gaining access to the trial exhibits. The newspapers and reporter appealed.

The court noted that because the case involved a factual controversy that was “capable of repetition, yet evading review,” the issue was not moot even though voir dire had concluded. Relying on a Supreme Court decision, the court decided the public and the press have a right to attend criminal trials, which includes a right to attend voir dire. The court noted that a standard must be met for closure, which included considering other alternatives, identifying the interest requiring closure, and narrowly structuring the closure so that the interest was protected, and that standard was not met. As to the second order, the judge abused his discretion when he prevented only one specific reporter from gaining access to the exhibits. Therefore, the court vacated both orders made by the trial judge.

*Journal/Sentinel, Inc. v. Sch. Bd.*<sup>95</sup>

A Memorandum of Understanding was drafted from the settlement of a lawsuit where the superintendent of a school district was suing the district and school board. The Memorandum of Understanding, including the settlement terms, was published in the Journal Sentinel’s newspapers. The school board sued, claiming it was protected from disclosure, but the court granted summary judgment in favor of the Journal Sentinel. The school board appealed.

In affirming the lower court’s ruling, the court of appeals found that the school board was defined as an “authority,” and under Wisconsin statutes<sup>96</sup> its records are public records by law. Therefore, the newspaper had the right to publish the settlement terms. The court further held that the memorandum was not considered a “draft,” and consequently would not be excluded from being a public record. The school board claimed that a balancing of interests would favor keeping the memorandum private because keeping settlements confidential would shield the school board from public scrutiny. However, the court disagreed and found that attorney-client privilege did not apply. The court held that the public interest in inspection outweighed the promise of confidentiality.

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95. 521 N.W.2d 165 (Wis. Ct. App. 1994).

96. WIS. STAT. §§ 19.31–.37 (2006).

## B. Freedom of Expression

The First Amendment allows freedom of expression in art, publishing, and artistic performance. However, freedom of expression does not apply to indecent forms of art. Application of the First Amendment rights to this industry can be controversial because people have differing views about what qualifies as art and what constitutes decency.

Wisconsin courts have had to answer several questions regarding First Amendment rights. First, the courts have had to decide whether music can be played in public places, or whether performances can be held at malls against the wishes of mall management. Second, courts have had to address whether decency ordinances violate the First Amendment. The key issue in these ordinances that restrict First Amendment rights is that they cannot be vague or overbroad, otherwise the ordinance will be struck down as unconstitutional.

### *Kois v. Breier*<sup>97</sup>

Kois was the editor and publisher of *Kaleidoscope*, a newspaper sold and distributed in Wisconsin. Brier, the Chief of Police in Milwaukee, and McCann, the District Attorney, threatened to prosecute Kois for violating obscenity statutes. Kois requested declaratory and injunctive relief against the defendants to prevent them from enforcing the statute and interfering with his newspaper. Kois requested a three judge court resolve the issue because of constitutional implications; however, Kois had the constitutional challenge from his complaint removed.

The court held that because Kois dropped the constitutional challenge from his complaint, the issue no longer needed a three judge court. The court held that, although there were aspects of the publication that would fit into the category of obscene, the dominant theme of the publication was political and social commentary, and the majority of the publication was not for a "prurient interest in sex." Therefore, the court granted a declaratory judgment stating the publication was not obscene as a matter of law. Because there was no bad faith in the threat of prosecution and the defendants were expected to follow the holding of the case, the court denied the motion for an injunction restraining the defendants from prosecuting Kois under the obscenity statutes. However, if the defendants would have continued to threaten prosecution the plaintiff could have received equitable relief.

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97. 312 F. Supp. 19 (E.D. Wis. 1970).

*Oestreich v. Hale*<sup>98</sup>

Oestreich was working at Karmel Korn in Manitowoc, which sold various newspapers and magazines. A Manitowoc police officer entered Karmel Korn and bought three magazines, and then informed Oestreich he was violating an ordinance of the municipal code that prohibited the sale of obscene materials. Oestreich filed a motion for declaratory judgment to declare that the ordinance was unconstitutional on its face because it was vague and overbroad.

The court held that by using the words “demoralizing” and “immoral” the ordinance was vague, as was the phrase “indecent representation . . . tending to the corruption of morals.” The court found that because the words were not defined anywhere in the ordinance, there was a danger of chilling constitutionally protected rights and freedoms. Therefore, the court held the ordinance was unconstitutional on its face because it was vague and overbroad.

*Saxe v. Brennan*<sup>99</sup>

Saxe owned and operated an art studio that allowed patrons to paint and/or sketch nude models provided by Saxe. Milwaukee passed an ordinance prohibiting “body studios,” and Saxe voluntarily closed down for fear of prosecution; however, he filed a suit challenging the constitutionality of the ordinance.

Although Saxe “voluntarily” closed down his business, the court found that he still suffered irreparable harm because he was complying with the statute that prohibited his business. The court held that the ordinance was unconstitutionally overbroad and vague because it included activities that did not qualify as obscene. For that reason, the court granted the preliminary injunction.

*City of Milwaukee v. Ziegman*<sup>100</sup>

Ziegman had a tavern in the City of Milwaukee and was convicted twice of allowing an entertainer to perform obscene acts. Ziegman appealed the convictions, arguing that the ordinance he was convicted under was a violation of the First Amendment. The court upheld the convictions because Ziegman could not show the ordinance was invalid beyond a reasonable doubt, because there was a reasonable basis for the ordinance, and because there is case law

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98. 321 F. Supp. 445 (E.D. Wis. 1970).

99. 416 F. Supp. 892 (E.D. Wis. 1976).

100. 306 N.W.2d 308 (Wis. Ct. App. 1981).



from the Supreme Court supporting the ordinance.

*Jacobs v. Major*<sup>101</sup>

Richard and David Jacobs owned the two large shopping malls in Madison. The malls had a policy of not allowing political or religious activities, leafleting, handbilling, or soliciting shoppers on mall premises. The group Nu Parable, which was formed by Major, attempted to get permission from the mall manager to hold a performance to protest nuclear war at the malls. When the mall manager refused, the group began hand delivering letters to the mall tenants to get support from the merchants association to perform. Jacobs sought a temporary restraining order to prevent the group from entering the malls. The group then filed a counterclaim based upon the mall restricting its freedom of speech. A temporary injunction was granted to Jacobs, but the group violated the order by entering the property and performing. The trial court then granted a permanent injunction preventing the group from performing on the property, but denying the request for damages. Jacobs appealed to broaden the scope of the injunction to include other activities and to appeal the decision denying damages. The court of appeals found that because there was no state action, there was no constitutionally protected freedom of speech, and it affirmed the lower court's decision. The court also affirmed the scope of the injunction and held that the lower court did not abuse its discretion by not considering damages.

The Supreme Court of Wisconsin considered whether the Wisconsin Constitution would require the mall owners to allow others to use their property to exercise their own free speech rights, against the owners' wishes. The court affirmed the court of appeals's decision that there was no right of free speech because there was no state action. There was no state action because although the mall was open to the public, it was private property. It could not be considered "essentially a public function" because malls are for the profit of the owners of the business and property, not for the benefit of the public. The court affirmed that the group had no right to perform at the malls. The court then noted that because it was private property, the group was trespassing. Therefore, the court modified the court of appeals's decision, and held that the lower court abused its discretion by not considering whether damages were appropriate.

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101. 390 N.W.2d 86 (Wis. Ct. App. 1986), *aff'd in part*, 407 N.W.2d 832 (Wis. 1987).

*City of Madison v. Baumann*<sup>102</sup>

Two musicians received citations for violating anti-noise ordinances by playing musical instruments late at night in a park. The police received a call from a person living sixty-six feet away who could not sleep. The call was not an isolated incident; the police were called between fifteen and thirty times a month complaining about noise from the park. The musicians argued it was constitutionally protected under the First Amendment. A circuit judge dismissed the complaints because the court held the ordinance was unconstitutional because it was overbroad and vague. The court of appeals affirmed the lower court's decision that the ordinance was overly broad.

The Supreme Court of Wisconsin noted that a municipality could enact ordinances that limited free speech for a legitimate government interest, which in this case was maintaining the peace and quiet of the area. The court reversed the lower courts, holding that the ordinance was not overly broad or vague because it applied only to noise that would unreasonably disturb the peace. The court found that including a "reasonableness standard" did not make the ordinance unconstitutionally vague.

*Tee & Bee, Inc. v. City of West Allis*<sup>103</sup>

The West Allis Common Council created an ordinance regulating the adult bookstore industry and the permitted location for that type of business. After the ordinance was passed, Tee & Bee opened Super Video and Variety, which sold sexually explicit materials. The store did not fall within the ordinance's definition of an adult bookstore because there was no place in the establishment to show films or movies or to have live performances. The Council then changed the definition of adult bookstore in the ordinance so that Super Video and Variety would fall into the category of an adult bookstore. Tee & Bee sought a permanent injunction to prevent the city from enforcing the ordinance, but then Tee & Bee applied for a license to have an adult bookstore. The Council denied the request, and Tee & Bee restructured the business so that it would no longer be considered an adult business. The city sought summary judgment.

The court first noted that there was no genuine issue of material fact, so summary judgment would be appropriate. The court then held that even though Tee & Bee changed its business, it still had standing because if Tee & Bee were to prevail, it would return the business to its original state. The court

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102. 455 N.W.2d 647 (Wis. Ct. App. 1990), *rev'd*, 470 N.W.2d 296 (Wis. 1991).

103. 936 F. Supp. 1479 (E.D. Wis. 1996).

then considered the constitutionality of the ordinance. The court held that the ordinance was constitutional. The court reasoned that the city met a four-part test that would allow it to regulate activities that were otherwise protected by the First Amendment. The four prongs of the test were: “(1) the intended activity lies within the governmental body’s sphere of regulatory power; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to suppressing the content of the regulated material; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.”<sup>104</sup>

#### *4. Intellectual Property Law*

With the amount of value attached to intellectual property rights, it is not surprising that there has been a significant amount of case law surrounding intellectual property. All artists, publishers, and performers derive value from intellectual property rights. Wisconsin has seen cases in this area involving copyrights and trademarks.

##### *A. Copyright Law*

Copyright law provides an important protection to all artists, performers and publishers. The value of one’s work is minimized if it can be reproduced. Therefore, copyright owners use their rights to prevent others from copying their work for profit. There can also be an issue as to who owns and controls the copyright when it is either a joint effort or a work for hire.

#### *Gaiman v. McFarlane*<sup>105</sup>

Gaiman and McFarlane were both involved with the production of comic books. Both wrote scripts for comic books, and McFarlane also illustrated and published comic books. McFarlane published the comic book *Spawn* that was initially criticized for bad writing. McFarlane then invited Gaiman and three others to each write a script for the book. There was no conversation between the two about copyrights.

The new script written by Gaiman contained three new characters that Gaiman named, described, and wrote a script for, but who were drawn by McFarlane. One of the characters was later featured in a “mini-series” that Gaiman wrote. Gaiman was paid for his work and also received royalties.

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104. *Id.* at 1485.

105. 360 F.3d 644 (7th Cir. 2004).

When Gaiman became aware that McFarlane was looking to sell his enterprise, Gaiman attempted to secure, in writing, the joint copyrights of the three characters. McFarlane received copyrights for the books and characters. Gaiman believed he had joint ownership in the three characters he created. The district court held that Gaiman was co-owner of the characters and awarded Gaiman monetary relief.

McFarlane claimed that the statute of limitations had passed because it began to run when the comic books were published. However, the court held that the statute of limitations did not begin to run until Gaiman realized his rights were being violated, which was five years after the publication of the books. McFarlane further claimed that the characters were not copyrightable because the nature of the characters was commonplace. The court disagreed and found that the characters were sufficiently distinctive and copyrightable once they were drawn and named. Therefore, the Court of Appeals for the Seventh Circuit upheld the district court's decision.

#### B. Trademark Law

Trademarks are also important to artists, publishers, and performers because a trademark identifies the producer of the work. Trademark infringers will attempt to benefit from the reputation and good name of the trademark holder. Similar to any case involving trademark infringement, courts are concerned with the likelihood of confusion in art, publishing, and performance cases.

#### *Madison Reprographics v. Cook's Reprographics*<sup>106</sup>

Madison Reprographics reproduced documents and photographs for various businesses, and it used and registered the name "Madison Repro" for advertisements. Cook's Reprographics was a similar business with similar clients and used the name "Repro Plus." Madison Reprographics brought a claim for common law trade name infringement and statutory trademark infringement. The trial court dismissed the claim because Madison was unable to show a likelihood of confusion.

The court noted that a descriptive name could be protected under the common law only if there was evidence of secondary meaning, and generic terms could never be protected as a trade name. Because the trial court was considering the claim that the name acquired secondary meaning, the court implied that "Madison Repro" was descriptive, but found it had not acquired

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106. 552 N.W.2d 440 (Wis. Ct. App. 1996).

secondary meaning. The court of appeals affirmed the dismissal, but held that the term was generic, not descriptive. The trial court did not find there was enough actual evidence of a likelihood of confusion. The court of appeals affirmed because there was only sparse evidence of actual confusion. The court also found that the marks were not identical or similar enough for them to be indistinguishable. The court affirmed the trial court's decision to dismiss Madison Reprographics' claim.

*Patterson v. World Wrestling Entm't, Inc.*<sup>107</sup>

Patterson began by promoting and conducting wrestling shows in Milwaukee and surrounding areas under the names "United Wrestling Association," "U.W.A.," "Super Star Wrestling," and "Superstars of Wrestling." He also used the marks "World Wrestling Association" and "WWA" to promote wrestling matches. Patterson sent a letter to Vincent McMahon and the predecessor to the Good Humor Corporation to demand that they stop using any similar marks. Later, Patterson sent a letter to the companies offering to sell the trade names. The matter resulted in trademark litigation between the two parties; however, it was terminated by consent decree. Patterson claimed that World Wrestling Entertainment, Inc. (WWE) and the Good Humor Corporation, as the WWE's licensee, infringed on his marks. The defendants filed a motion for summary judgment and claimed the defenses of res judicata, judicial estoppel, and laches.

The court first analyzed the res judicata claim, which prevents a party from being taken to court multiple times for the same cause of action. The court held that there was no complete identity between the dispute that occurred over ten years prior and the current infringement claim, and therefore, res judicata was not an available defense. The court then analyzed the judicial estoppel claim and determined that there was a material issue of fact as to whether Patterson's current position was inconsistent with his previous position. Because Patterson sent the letter early on in the dispute and waited eighteen years before filing this claim, the defense of laches barred the infringement claims for "WWF," "World Wrestling Federation," and WWF Superstars." The defendants were unable to show the continuity of commercial impression, and so the court rejected the summary judgment based on the tacking theory. The court then found that Patterson was able to show bona fide use of the "WWA" and "World Wrestling Association" marks. Finally, the court considered whether there was a likelihood of confusion. After considering the seven factors in a likelihood of confusion test, the court

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107. No. 03-C-0374, 2006 U.S. Dist. LEXIS 7453 (E.D. Wis. Jan. 31, 2006)

determined that there was not a likelihood of confusion, and the defendants were entitled to summary judgment on those grounds.

### C. Trade Secret

Another aspect of intellectual property law involves trade secrets. Sometimes in business, maintaining the secrecy of certain information is very important, and as such, the information can be considered a trade secret. In the entertainment industry, client lists can be trade secrets because they are a vital aspect of business. However, in order to be protected as a trade secret the information cannot be readily accessible to the public.

#### *Gary Van Zeeland Talent, Inc. v. Sandas*<sup>108</sup>

Van Zeeland ran a talent booking agency, and Sandas was a former employee who had no previous experience in talent booking except for being a former musician. Prior to leaving and starting a competing business, Sandas copied Van Zeeland's customer list. The customer list was used by Van Zeeland to ensure Christmas cards were sent out. Van Zeeland claimed the customer list was a trade secret and filed a suit to enjoin Sandas from continuing to use the list. Sandas filed a motion for summary judgment, and the trial judge held summary judgment was appropriate because the list was not a trade secret. Van Zeeland appealed and requested that if the list was found not to be a trade secret then there was misappropriation of Van Zeeland's time and effort because the list was taken.

The court noted that customer lists could be protected as trade secrets; however, generally lists are not protected. To determine whether it should be a trade secret, the court considered a balancing interests test. The court found that because the list contained names and not addresses, the information was readily known outside of Van Zeeland's business. The list had only transitory value, and even though there was a clause in the contract stating that the customer lists are valuable and unique to the business, the court found that there could be no equitable estoppel because that would make the clause an unreasonable restraint on trade. Finally, the court held that the misappropriation doctrine would not apply to taking the customer list. Therefore, the Supreme Court of Wisconsin affirmed the summary judgment.

## VII. ENTERTAINMENT FACILITIES

A significant number of Wisconsin's legal disputes involving the

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108. 267 N.W.2d 242 (Wis. 1978).

entertainment industry revolve around entertainment facilities. These disputes have dealt with many legal issues, including tort, contract, and tax. However, the vast majority of entertainment facility litigation in Wisconsin has involved the First Amendment to the United States Constitution.<sup>109</sup>

### *1. Tort Law*

Like any other public place, entertainment facilities carry inherent tort liability risks. Individuals injured on the premises of an entertainment facility will always have the potential to sue the owner/operator of the facility. The lone Wisconsin tort case involving an entertainment facility is founded on an allegation of common law negligence and an alleged violation of Wisconsin's safe-place statute.<sup>110</sup>

Wisconsin's safe-place statute requires employers to keep a place of employment as safe as the nature of the premises reasonably permits.<sup>111</sup> Owners and operators of facilities are not liable for an unsafe condition unless they have actual or constructive notice of the condition.<sup>112</sup> Constructive notice exists when the unsafe condition existed for a sufficient length of time, whereby the owner should have discovered and fixed the unsafe condition.<sup>113</sup>

#### *Megal v. Green Bay Area Visitor & Convention Bureau, Inc.*<sup>114</sup>

Nancy Megal slipped on a ketchup-soaked french fry while walking down a stairway, as she was exiting the Brown County Veterans Memorial Arena following an ice show at the arena. Because of the slip, Megal fractured her left ankle. Megal sued the arena, alleging common law negligence and a violation of Wisconsin's safe-place statute. The trial court granted summary judgment in favor of the arena with respect to both claims.

The Wisconsin Court of Appeals affirmed the trial court's finding that Megal's claim did not support a safe-place statute violation. Megal could not prove the arena had actual notice of the french fry. She also could not prove how long the fry had been on the stairs. Without proof of how long an unsafe condition had existed, the defendant usually could not be assigned constructive notice of the condition. However, an exception to the general constructive notice rule exists. This exception allows for assignment of constructive notice

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109. U.S. CONST. amend. I.

110. WIS. STAT. § 101.11 (2006).

111. *Id.*

112. *Id.*

113. *Id.*

114. 672 N.W.2d 105 (Wis. Ct. App. 2003), *rev'd in part*, 682 N.W.2d 857 (Wis. 2004).

when there is “a reasonable probability that an unsafe condition will occur because of the nature of the business and the manner in which it is conducted.”<sup>115</sup> The court refused to apply the exception because the exception was intended for only a narrow set of circumstances where the unsafe condition is created by debris falling in the immediate area of where it came from. The french fry was located far from where it was purchased, making it less reasonable for the arena employees to notice the condition. The court determined that application of the exception in this case would be unreasonable because of the size of the venue. The court found that application of the exception in this type of situation would allow the exception to swallow the rule.

The court of appeals also determined that summary judgment dismissal of the common law negligence claim was appropriate because “a negligence claim cannot be maintained when a safe-place violation cannot be established.”<sup>116</sup>

On appeal, the Wisconsin Supreme Court upheld the court of appeals’s decision that Megal could not support a claim for violation of the safe-place statute. However, the court reversed the portion of the lower court decision pertaining to Megal’s common law negligence claim. The court found that Megal could show that the defendant failed to exercise reasonable care, and therefore, she could proceed with her negligence claim.

## 2. Contract Law

Contract law is another area that can have a significant impact on owners and operators of entertainment facilities. It is necessary for owners and operators of entertainment facilities to have contractual relationships with numerous parties, including entertainers and vendors. The only Wisconsin entertainment facility case involving contract law, focused on defining the place of employment. Wisconsin statute section 101.01<sup>117</sup> states, “place of employment, shall mean and include every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit.”<sup>118</sup>

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115. *Id.* at 108 (citing *Strack v. Great Atl. & Pac. Tea Co.* 150 N.W.2d 361, 364 (Wis. 1967)).

116. *Id.* at 111.

117. WIS. STAT. § 101.01 (2006).

118. *Mennetti v. W. Side Businessmen's Ass'n*, 18 N.W.2d 487 (Wis. 1945) (quoting WIS. STAT.



*Mennetti v. W. Side Businessmen's Ass'n*<sup>119</sup>

The defendant, West Side Businessmen's Association, entered into a contract with Ben Bergor for Bergor to provide entertainment during the defendant's Victory Harvest Fair. The plaintiff, Eddie Mennetti, was hired by Bergor to perform a comedy act during the fair. The defendants provided a platform for the plaintiff to perform his act. The platform was not satisfactory for the plaintiff's purposes, but he used it anyway. During one of his performances, the plaintiff was injured when the platform suddenly lurched and he fell.

The trial court gave the jury instructions that defined the plaintiff as the "frequenter" and the platform as his "place of employment." The court also instructed the jury that the defendant was the owner of the platform. The jury found the defendant liable and awarded the plaintiff \$7371.67 in damages. The defendant then appealed the decision to the Wisconsin Supreme Court.

The defendant claimed that the platform was not the plaintiff's place of employment. However, the court disagreed and held that the platform was the plaintiff's place of employment under Wisconsin Statute section 101.01(1).<sup>120</sup> The court found that even if the plaintiff is classified as an independent contractor, instead of an employee, he is still protected as a frequenter. The court affirmed the trial court decision because the defendant owned and controlled the platform, it was liable to the plaintiff for his injuries.

The defendant also claimed assumption of risk as a defense, but the court did not accept this defense because this defense is not available under the "safe-place statute."

### 3. Tax Law

As in any other industry, the entertainment industry has various tax issues that can lead to legal battles. There have been a handful of cases in Wisconsin involving the intersection of tax law, particularly the Internal Revenue Code, and entertainment facilities.

*Avalon Amusement Corp. v. United States*<sup>121</sup>

The plaintiff operated a public dance hall where patrons paid an admission fee to come and dance. The plaintiff also offered checkroom

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§ 101.01(1) (1945)).

119. 18 N.W.2d 487.

120. WIS. STAT. § 101.01(1) (2006).

121. 165 F.2d 653 (7th Cir. 1948).

service for a separate charge. The plaintiff was taxed as a “roof garden, cabaret, or other similar place furnishing a public performance for profit” under section 1700(e)(1) of the Internal Revenue Code.<sup>122</sup> The plaintiff paid the tax but sued to recover a portion of what he paid. The plaintiff argued that operation of the dance hall did not qualify under this section of the code because it was not a “public performance for profit.”

The district court determined that the tax was proper and decided in favor of the government. The Seventh Circuit affirmed the ruling of the district court. The court held that because the music for dancing was available to anyone who paid the admission fee, it did qualify as a public performance for profit and thus fit under section 1700(e)(1). Since the dance hall was a public performance for profit, the tax on the checkroom receipts was proper.

*Kern v. United States*<sup>123</sup>

The plaintiff taxpayer brought a claim seeking a tax refund of \$609.94. The United States filed a counterclaim for \$65,831.03 in additional taxes. The plaintiff claimed that he was improperly taxed under the cabaret excise tax because the barroom was completely separate from the dance room in his establishment.

The plaintiff filed for summary judgment, which was granted by the court. The court held that under this tax, Congress intended a unity between the service of refreshments and the entertainment at the facility. The court found that this unity was absent at the plaintiff’s establishment because a person could not see the dance room from the bar. The only door between the two rooms was for emergency use only, and therefore, was almost always closed.

*Schmidt v. Labor & Indus. Review Comm’n*<sup>124</sup>

The Labor and Industry Review Commission (LIRC) determined that Anthony Schmidt was liable for unemployment compensation tax for several exotic dancers who worked in his tavern. The Commission determined that the dancers qualified as Schmidt’s employees, and therefore, he had to pay the tax. Schmidt sued, alleging that the dancers did not qualify as his employees under Wisconsin Statute section 108.02(12)(a).<sup>125</sup> The trial court agreed and reversed the Commission’s ruling. The Commission appealed, and the court of appeals reversed the trial courts ruling, holding that the dancers were

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122. I.R.C. § 1700(e)(1) (1939).

123. 264 F. Supp. 952 (W.D. Wis. 1966).

124. 451 N.W.2d 805 (Wis. Ct. App. 1989).

125. WIS. STAT. § 108.02(12)(a) (2006).

employees and Schmidt was liable to pay the tax.

The dancers were presumptively Schmidt's employees under section 108.02(12)(a), which states that "employee means any individual who is or has been performing services for pay for an employing unit."<sup>126</sup> Schmidt argued that he could rebut the presumption because he could show that the dancers were free of his "control and direction." The court disagreed, holding that the dancers were subject to his control and direction. Schmidt had a set of rules the dancers were required to follow and he would intervene if he believed that dancer's performance was obscene.

*TMI, Inc. v. Labor & Indus. Review Comm'n*<sup>127</sup>

The LIRC held that the plaintiff, TMI, was liable for unemployment compensation taxes for exotic dancers who performed at a tavern owned by TMI. The LIRC determined that the dancers were employees under Wisconsin Statute section 108.02(12).<sup>128</sup> TMI sued and the trial court reversed LIRC's finding. LIRC then appealed and the court of appeals reversed the trial court's ruling.

The court of appeals held that LIRC had credible and ample evidence to support its determination. The dancers did provide their own costumes, music, and routines. They also determined the length of their sets. However, TMI provided the stage, lighting, sound equipment, and the dance licenses. TMI also restricted the dancer's conduct, so that the dancers would not do anything that might jeopardize TMI's licenses. The court determined that TMI had substantial control over the dancers to satisfy the presumption that they were employees of TMI. TMI did not show enough evidence to rebut the presumption that the dancers were employees of TMI.

#### 4. *Constitutional Law*

The area of law that has seen the most litigation involving Wisconsin entertainment facilities is constitutional law. These cases have primarily dealt with the First and Fourteenth Amendments, with most of the cases based on First Amendment challenges.

The plaintiffs in the constitutional challenges were usually persons who had been restricted in their ability to operate their business by a local ordinance or state statute. The ordinances or laws often prohibited or

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126 WIS. STAT. § 108.02(12)(a) (2006).

127. 558 N.W.2d 706 (Wis. Ct. App. 1996).

128. WIS. STAT. § 108.02(12).

restricted the adult entertainment facilities the plaintiffs wished to operate. Plaintiffs brought constitutional claims, alleging that the ordinances and statutes violate their right to free speech, due process, and equal protection.

#### A. Freedom of Expression

There has been a large amount of litigation in Wisconsin dealing with entertainment facilities and First Amendment rights. The First Amendment to the United States Constitution states “[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>129</sup> Some plaintiffs have also claimed that the law in question violates his or her free speech rights under the Wisconsin Constitution. The Wisconsin Constitution says, “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.”<sup>130</sup>

The first case in this area was decided in 1937, and the most recent was decided last year in 2006. However, a majority of the cases have been litigated within the last twenty years. The cases have come before Wisconsin state and federal courts.

#### *Stetzer v. Chippewa County*<sup>131</sup>

The plaintiff, the owner of a tavern, challenged a county ordinance that restricted the hours of operation for dance halls. The plaintiff's tavern featured a dance floor and a three-piece orchestra. The plaintiff's business would have been harmed by the ordinance, particularly on Sundays because the ordinance prohibited dancing on Sundays at dance halls. The plaintiff contended that the ordinance did not apply to his business and that the ordinance was unconstitutional because it was the result of improper delegation of legislative power to a county board.

The circuit court held the ordinance was valid and granted the county's motion for summary judgment. The Supreme Court of Wisconsin upheld the circuit court's decision. The court found that public dances and dance halls were proper subjects of the county board's police power, and therefore, there was no improper delegation of legislative authority. The court also

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129. U.S. CONST. amend. I.

130. WIS. CONST. art. I, § 3.

131. 273 N.W. 525 (Wis. 1937).

determined that the ordinance applied to the plaintiff's establishment.

*Escheat, Inc. v. Pierstorff*<sup>132</sup>

The plaintiff owned a tavern that featured nude and semi-nude entertainment. In September 1972, town officials revoked the plaintiff's liquor license for operating "an indecent house by presenting performances of lewd, obscene and indecent matter."<sup>133</sup> The plaintiff sued for injunctive relief, estopping the revocation of its liquor license. The plaintiff claimed the town officials misapplied the standards of obscenity in the statute in determining that the tavern was an "indecent house." The plaintiff also contended that the revocation of the liquor license was an action that was entitled to judicial review because the revocation was done to prevent nude and semi-nude dancing, which was arguably protected by the First Amendment.

The court held that the plaintiff did not show he had a reasonably good chance of success on the merits because it did not appear that the town officials misapplied the standard. However, the court granted the plaintiff's temporary injunction and ordered the liquor license reinstated until a proper hearing could have been convened. The court found the plaintiff had shown irreparable harm. The court reasoned that irreparable harm existed because the purpose of the liquor license revocation was to terminate a First Amendment right. The court decided that the town officials could not revoke the liquor license without an appropriate hearing.

*Little v. City of Greenfield*<sup>134</sup>

The plaintiffs wanted to open a business featuring nude dancing, but they were unable to obtain the proper permit from the city. After learning about the plaintiffs' intention to open the nude dancing business, the city amended its ordinance to require a special use permit to operate a nude dancing business. The city then denied the plaintiffs' application for a special use permit. The plaintiffs then sued the city and its officials claiming the city's actions violated their constitutional rights to free speech, due process, and equal protection. The plaintiffs sought injunctive relief.

The court granted the plaintiffs' motion for summary judgment. The court held that the city's amendment to the ordinance was targeted at suppressing nude dancing, which is a constitutionally protected form of expression. The court also found that the special use permit was content-based discrimination

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132. 354 F. Supp. 1120 (W.D. Wis. 1973).

133. *Id.* at 1122.

134. 575 F. Supp. 656 (E.D. Wis. 1983).

that violated the Equal Protection Clause. The court granted the preliminary injunction because the plaintiffs were possibly going to suffer irreparable harm.

*Suburban Video, Inc. v. City of Delafield*<sup>135</sup>

Superb Video was an adult oriented business that specialized in selling adult movies, books, and magazines. Superb Video sued the City of Delafield, seeking injunctive relief from an ordinance that regulated “adult oriented businesses.” Superb claimed the ordinance violated the First, Fifth, Ninth, and Fourteenth amendments to the United States Constitution.

The court denied most of Superb’s claim; however, the court found that portions of the ordinance’s licensing system violated the First and Fourteenth Amendments. The court enjoined the city from enforcing the portions of the licensing scheme deemed unconstitutional. The court held that requiring background checks for shareholders, officers, and employees of adult oriented businesses was unconstitutional because this requirement did not help serve the ordinance’s stated purpose of protecting public health, welfare, and safety. The court severed the ordinance and upheld the remainder of the ordinance.

*Libra Books, Inc. v. City of Milwaukee*<sup>136</sup>

The plaintiff, Libra Books, sued the city claiming an ordinance was in violation of the First and Fourteenth Amendments. The ordinance regulated the structure of movie booths where customers could watch pornographic videos. The plaintiff had eighteen of the booths in its bookstore. The ordinance required that the booths have at least one side completely open to the public. The plaintiff’s booths had three solid walls and a swinging door on the fourth side.

The plaintiff contended that the ordinance infringed on its freedom of expression. The court disagreed and granted the defendant’s motion for summary judgment. The court held that the ordinance properly served the legitimate government interests of controlling communicable diseases and maintaining sanitary conditions in public places. The court also found that the ordinance was narrowly tailored to satisfy its objectives and was not overbroad.

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135. 694 F. Supp. 585 (E.D. Wis. 1988).

136. 818 F. Supp. 263 (E.D. Wis. 1993).

*Fond du Lac County v. Mentzel*<sup>137</sup>

Donald Mentzel, the owner of an exotic nightclub, was found guilty of violating an ordinance that required liquor license holders to obtain a cabaret permit before providing any form of dance entertainment. The ordinance also prohibited nude dancing and required dancers to wear a minimal amount of clothing. Mentzel was cited for violating the ordinance on three occasions.

Mentzel appealed the trial court's conviction claiming the county's regulation of dance entertainment was unconstitutionally vague and overbroad. The court of appeals agreed, holding that the ordinance was unconstitutionally overbroad because it prohibited nude expression that was not associated with harmful secondary effects. The court found that there were types of nude expression unrelated to the harmful secondary effects of some nude dancing.

Mentzel also claimed that the ordinance was unconstitutional because it violated the equal protection clause. He claimed it was in violation of equal protection because the county ordinance did not prohibit nude dancing in the cities within the county. The court held that the ordinance did not violate the equal protection clause of the constitution. The court found that the discrepancies in regulation are a natural part of systematic zoning where each city has its own governing authority that holds police power.

*Matney v. County of Kenosha*<sup>138</sup>

The plaintiffs, Phil Matney and Satellite News and Video, Inc., owned and operated an adult bookstore in Kenosha County. The plaintiffs sued the county, challenging a Kenosha County Board of Health Regulation. The regulation required at least one open side on booths in adult video stores where sexually explicit videos were viewed. The plaintiffs alleged that the regulation violated their free speech rights under the First Amendment and the Wisconsin Constitution. The plaintiffs sought injunctive relief, while the county moved for summary judgment.

In granting the county's motion for summary judgment, the district court held that the regulation was constitutional. The county enacted the regulation to prevent the spread of diseases, namely sexually transmitted diseases. The court found that preventing the spread of disease was a legitimate government objective and that the regulation served this objective. The court also determined that the purpose of the regulation was to prevent the spread of diseases, not to restrict free speech.

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137. 536 N.W.2d 160 (Wis. Ct. App. 1995).

138. 887 F. Supp. 1235 (E.D. Wis. 1995), *aff'd*, 86 F.3d 692 (7th Cir. 1996).

The court of appeals affirmed the trial court decision. The court of appeals agreed that the regulation served legitimate health and safety concerns and did not control the content of the films or the customers' ability to view the films. The court also found that the plaintiffs had no constitutional right to privately view the films in a public establishment.

*DiMa Corp. v. Town of Hallie*<sup>139</sup>

The plaintiff corporation owned and operated an adult bookstore. Upon learning of the plaintiff's intention to operate the adult store within town limits, the town responded by enacting an ordinance restricting the hours an "adult establishment" may operate. The plaintiff filed an action alleging that the ordinance violated the plaintiff's First Amendment right to freedom of expression. The court granted the town's motion for summary judgment. Although, the court denied the town's motion for attorney's fees and costs.

The court held that the ordinance was constitutional because it reasonably furthered its stated goals. The town argued that the ordinance was intended to prevent crime. The court accepted that the ordinance furthered the interest of preventing crime. The ordinance was narrowly tailored to prohibit adult establishments from being open during the hours when crime is most likely to occur and when law enforcement is least capable of preventing it. The court also found that adult establishments were left ample time to be open for operation.

*Lounge Mgmt., Ltd. v. Town of Trenton*<sup>140</sup>

The Town of Trenton had an existing ordinance that prohibited public nudity in establishments possessing a liquor license. Shortly after receiving a liquor license, Lounge Management decided to offer nude dancing and sued the town seeking injunctive relief banning the town from enforcing the ordinance. Lounge Management contended that the ordinance was in violation of the First Amendment to the United States Constitution and article I, section 3 of the Wisconsin Constitution.<sup>141</sup> The circuit court upheld the constitutionality of the ordinance and then the court of appeals certified the question for the Supreme Court of Wisconsin.

The Supreme Court of Wisconsin reversed the circuit court and found the ordinance was unconstitutional. The court held that the ordinance was overbroad because it restricted all forms of nudity in any establishment with a

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139. 60 F. Supp. 2d 918 (W.D. Wis. 1998).

140. 580 N.W.2d 156 (Wis. 1998).

141. WIS. CONST. art. I, § 3.



liquor license. The court also refused to sever the ordinance and uphold the portions it deemed constitutional.

*Schultz v. City of Cumberland*<sup>142</sup>

Joseph Schultz, the owner of the Island Bar, and Tonya Norwood, an Island Bar exotic dancer, sued the City of Cumberland challenging the city's "sexually oriented business" ordinance. The Island Bar was a bar that featured nude female dancers. The city enacted its sexually oriented business ordinance after law enforcement officials discovered that prostitution and other contact between dancers and patrons had occurred at the bar.

The district court granted the plaintiff's motion for an injunction that restricted the city from enforcing the sexually oriented business ordinance. The court held that the ordinance was unconstitutionally overbroad because it restricted more free speech than was necessary to meet its goals. The court also found that the overbroad portion of the ordinance could not be severed from the parts of the ordinance that were constitutional.

On appeal, the Seventh Circuit affirmed in part and reversed in part the district court's decision. The Seventh Circuit reversed the district court by upholding the portion of the statute restricting the hours of operation for sexually oriented businesses. The court determined that this restriction was reasonable. However, the court affirmed the district court finding that the ordinance unconstitutionally restricted free expression. The Seventh Circuit agreed with the district court that the ordinance went too far in how it regulated adult entertainment.

*Town of Lyndon v. Beyer*<sup>143</sup>

Beyer operated an establishment called "Cruisin" that served alcohol and offered nude dancing entertainment. Shortly after Beyer received a liquor license, the town adopted an ordinance prohibiting nude dancing in establishments holding liquor licenses. Following the adoption of the ordinance, Beyer made a change, requiring his dancers to wear minimal clothing. Despite the change, the town sued Beyer, alleging that Beyer violated the ordinance. Beyer filed a counterclaim, claiming the ordinance violated the First Amendment.

The trial court granted summary judgment for the town and Beyer appealed. The court of appeals reversed the trial court's decision. The court

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142. 26 F. Supp. 2d 1128 (W.D. Wis. 1998), *rev'd in part*, 228 F.3d 831 (7th Cir. 2000).

143. 627 N.W.2d 548 (Wis. Ct. App. 2001).

found that the ordinance was unconstitutional because it was overbroad. The ordinance was intended to eliminate the negative secondary effects of nude dancing. However, the ordinance regulated activity that was not reasonably connected to the negative secondary effects, and thus, the ordinance was overbroad. The court refused to sever the ordinance because it determined the ordinance needed to be rewritten.

*Wil-Kar, Inc. v. Vill. of Germantown*<sup>144</sup>

The plaintiff, Video Update, was a store that sold and rented videos. Approximately two percent of the Video Update's videos were adult oriented. Video Update maintained a separate section of the store for its adult videos. Video Update's adult section was closed in January 2001 when a police officer inspected the store and discovered that Video Update did not have an adult oriented business license, which was in violation of a village ordinance. Video Update sued the village, claiming the ordinance violated the First Amendment.

The court granted the plaintiff's motion for a preliminary injunction. In granting the plaintiff's motion, the court held that the ordinance was unconstitutionally overbroad. The court found the ordinance overbroad because it did not properly serve the governmental interest of regulating the negative secondary effects of adult entertainment. The court also noted that stores, like Video Update, which deal with a limited amount of adult material, usually do not cause negative secondary effects.

The court also held that the ordinance violated the prior restraint doctrine. The court found that the village board had virtually unlimited power to impose conditions on establishments applying for an adult oriented business license. The court determined that the court's power to impose conditions on applicants operated as censorship that violated the prior restraint doctrine.

*Clarkson v. Town of Florence*<sup>145</sup>

Raissa Clarkson, the owner of Golden Nugget Tavern, sued the Town of Florence alleging that an ordinance enacted by the town was in violation of the First Amendment. The ordinance prohibited nude dancing at taverns in the Town of Florence. Golden Nugget Tavern featured dancers who performed partially nude. Clarkson filed a motion for summary judgment on the issue of liability and a motion for injunctive relief. The town also filed a motion for

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144. 153 F. Supp. 2d 982 (E.D. Wis. 2001).

145. 198 F. Supp. 2d 997 (E.D. Wis. 2002).

summary judgment on the issues of liability and damages.

The court granted Clarkson's motion for summary judgment and denied the town's motion. The court also denied Clarkson's motion for injunctive relief. The court held that the ordinance was unconstitutional because it was overbroad and was not narrowly construed to combat the negative "secondary effects" of nude dancing. The ordinance applied to a broader range of expressive activities than was necessary to achieve the goal of combating the secondary effects. The court applied intermediate scrutiny in its analysis of the ordinance. The town had repealed the ordinance prior to the action going to trial; however, the court determined that Clarkson still had standing on the issues of liability and damages.

In granting Clarkson's motion for summary judgment, the court found the town liable to Clarkson. The court also held that there was enough evidence for a reasonable jury to award Clarkson damages for emotional distress. Clarkson also could recover "presumed" damages without actual proof of injury because it was a constitutional violation.

*Town of Delaven v. Suriano*<sup>146</sup>

Candice Suriano leased property to the Greater Geneva Group, Inc. where the Greater Geneva Group operated an adult novelty store named Exotica V. The circuit court enjoined Exotica V from operating its adult entertainment establishment at its location. The circuit court issued the injunction because Exotica V was in violation of Walworth County zoning ordinances. Exotica V violated the zoning ordinances by operating an adult entertainment establishment within 750 feet of a park. The defendants appealed the circuit court's decision to the Wisconsin Court of Appeals.

The court of appeals affirmed the circuit court ruling. The court found that the town did not have any administrative remedies available, and therefore, seeking an injunction was proper on the town's part. The court also held that the Exotica V did not qualify as a legal pre-existing, non-conforming use under the amended zoning ordinance. The court determined that Exotica V never qualified as a valid unspecified use under the prior ordinance; and thus, it did not now qualify a legal pre-existing use.

The defendants also argued that provisions of the prior zoning were unconstitutional restraints on free speech. The court also rejected this argument, holding that the prior zoning ordinance was not a licensing ordinance and did not specifically restrict adult entertainment establishments.

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146. 644 N.W.2d 294 (Wis. Ct. App. 2002).

*Ben's Bar, Inc. v. Village of Somerset*<sup>147</sup>

Ben's Bar, Inc. and two of the erotic dancers who worked at Ben's Bar sued the Village of Somerset for its enactment of a "Sexually Oriented Business Ordinance."<sup>148</sup> The ordinance made it a violation for "any Person to knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business."<sup>149</sup> It also prohibited the consumption of alcoholic beverages on the premises of a sexually oriented business.

The plaintiffs sought permanent injunctive relief barring enforcement of the statute. The plaintiffs alleged that the ordinance violated their right to free expression under the First and Fourteenth Amendments to the United States Constitution and the Wisconsin Constitution.<sup>150</sup> The district court denied the injunction, holding that the plaintiffs were not likely to succeed on the merits. The court determined that the ordinance passed constitutional muster. After unsuccessful attempts to settle, the defendants filed a motion for summary judgment. The district court granted the motion because the ordinance was constitutional. The plaintiffs appealed the summary judgment. On appeal, the plaintiffs challenged only the portion of the ordinance prohibiting consumption of alcoholic beverages at sexually oriented businesses. They alleged that this portion of the ordinance was unconstitutional.

The court of appeals held that the portion of the ordinance prohibiting alcohol consumption was constitutional. The court applied intermediate scrutiny in its analysis of the ordinance. The court held that the village's purpose in enacting this portion of the ordinance was legitimate and that the ordinance served this purpose. The village's purpose in enacting the statute was to reduce or eliminate the "secondary effects" associated with the combination of adult entertainment and alcohol consumption.

*G.M. Enters., Inc. v. Town of St. Joseph*<sup>151</sup>

The plaintiff, operator of a club offering topless dancing, challenged the constitutionality of two town ordinances. The ordinances prohibited nude dancing at establishments licensed to sell alcohol. The town enacted the ordinances because of concern about negative secondary effects linked to "sexually oriented businesses." The plaintiff filed a claim seeking declaratory and injunctive relief. The town filed a motion for summary judgment, which

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147. 316 F.3d 702 (7th Cir. 2003).

148. Village of Somerset, Wis., Ordinance A-472 (Oct. 24, 2000).

149. *Id.* § 5(a).

150. WIS. CONST. art. I, § 3.

151. 350 F.3d 631 (7th Cir. 2003).

was granted by the district court.

The plaintiff appealed, claiming that the ordinances violated the First and Fourteenth Amendments. The Seventh Circuit upheld the district court's decision to grant summary judgment in favor of the town. The court held the ordinances were aimed at minimizing the negative secondary effects, not limiting free speech. The court also found that the ordinances reasonably promoted the town's interest in minimizing the secondary effects.

*Kraimer v. City of Schofield*<sup>152</sup>

The plaintiffs were owners of a property that they intended to open and operate as a non-alcoholic adult entertainment facility. The plaintiffs were not able to open the facility because the city would not give them the proper permits. The plaintiffs filed suit against the city, alleging that certain ordinances, which the city relied on in denying the plaintiff's permits, were unconstitutional. The plaintiffs sought injunctive relief and monetary damages for losses they suffered and filed a motion for summary judgment.

Shortly after the plaintiffs filed suit, the city repealed one of the ordinances in question. However, the court determined that the plaintiffs' challenge, related to that ordinance, was not moot because the plaintiffs still had a claim for damages for the harm done while the ordinance was in place.

The court granted the plaintiffs' motion for summary judgment relating to all of the ordinances except one. The court found that all but one of the ordinances unconstitutionally violated the plaintiffs' right to freedom of expression. Regarding the ordinance that the court found to be constitutional, the court held that the plaintiffs did not show how the ordinance would limit free speech. The city was enjoined from enforcing the ordinances the court deemed unconstitutional.

*MDK, Inc. v. Village of Grafton*<sup>153</sup>

The plaintiff corporation challenged a village ordinance that it contended prohibited it from offering erotic dancing at its tavern, claiming that the ordinance violated its First Amendment right to free expression. The plaintiff and the defendant both moved for summary judgment. The court had previously denied the plaintiff's request for a preliminary injunction.

The village claimed it enacted the ordinance to prevent the negative secondary effects associated with adult entertainment facilities. The village

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152. 342 F. Supp. 2d 807 (W.D. Wis. 2004).

153. 345 F. Supp. 2d 952 (E.D. Wis. 2004).

said the negative secondary effects included “unlawful sexual activity, sexually transmitted diseases, urban blight, increased crime and reduced property values.”<sup>154</sup>

The court granted the plaintiff summary judgment. The court held that the ordinance went too far in that it regulated establishments that did not produce the negative secondary effects the village was concerned with. The court determined that the ordinance was overbroad and restricted more speech than was necessary to serve the governmental interest.

*Eggert Group, LLC v. Town of Harrison*<sup>155</sup>

The owner of a club that sold alcohol and offered entertainment, including nude dancing, sued the town for enacting an ordinance that prohibited nude dancing in an establishment licensed to sell alcohol. The plaintiff claimed the ordinance was facially invalid under the First Amendment. The parties agreed to the jurisdiction of a magistrate judge. The plaintiff filed a motion for summary judgment, which was granted by the magistrate judge.

The magistrate judge held that the ordinance was unconstitutional because it was overbroad. The town’s stated purpose for the ordinance was to reduce the “negative secondary effects” associated with the combination of alcohol and nude dancing. The court found that the ordinance extended to include conduct that did not have the negative secondary effects. In the form it was enacted, the ordinance would have gone so far as to prohibit nude dancing at bachelor parties in hotel rooms, if the hotel had a liquor license. The town was enjoined from enforcing the ordinance.

*Schmitt’s City Nightmare, LLC v. City of Fond Du Lac*<sup>156</sup>

Schmitt’s City Nightmare, LLC sued the City of Fond Du Lac challenging the city’s adult oriented business ordinance and its loitering ordinance. The owners of Schmitt’s intended to offer erotic dance entertainment; however, the owners opted to avoid offering erotic entertainment because they feared prosecution under the city’s adult oriented business zoning ordinance. Schmitt’s also challenged the city’s loitering ordinance because it alleged that police harassed Schmitt’s patrons who congregated outside of the business. Schmitt’s alleged that both ordinances were overbroad and that the adult business ordinance was in violation of the

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154. *Id.* at 955.

155. 372 F. Supp. 2d 1123 (E.D. Wis. 2005).

156. 391 F. Supp. 2d 745 (E.D. Wis. 2005).

### First Amendment.

Both parties filed for summary judgment, and the court granted summary judgment in favor of the city. The court held that both ordinances were constitutional. In upholding the loitering ordinance, the court found the ordinance was not overbroad because it was narrowly construed to prohibit loitering only in situations where the loitering posed a threat. The court determined the adult oriented business ordinance was constitutional because it was not overbroad and it served a legitimate government interest. The court held that the zoning ordinance did not unreasonably restrain free speech because it was a zoning ordinance, and therefore, it restricted only certain activity in certain areas.

### *Wis. Gifts, Inc. v. City of Oak Creek*<sup>157</sup>

Wisconsin Gifts, Inc. operated a store named Cupid's Toys, which sold adult entertainment materials. Wisconsin Gifts sued the City of Oak Creek after the city amended its zoning and adult entertainment business ordinances. Wisconsin Gifts claimed the ordinances were unconstitutional and that Cupid's Toys did not qualify as an adult entertainment business under the ordinance. The circuit court granted summary judgment on behalf of the city, dismissing Wisconsin Gifts' complaint.

The court of appeals upheld the circuit court's ruling. The court of appeals held that Wisconsin Gifts had not presented sufficient evidence to show the ordinances were unconstitutional. Wisconsin Gifts also did not present evidence to dispute the city's need for the ordinances. In addition, the court found that Wisconsin Gifts did not have the right to challenge the city's determination that Cupid's Toys was an adult entertainment business. Wisconsin Gifts could not challenge the determination because it had not exhausted its administrative remedies with the city, and therefore, the court did not consider whether Cupid's Toys was an adult entertainment business under the ordinance.

### B. Due Process

There has been one entertainment facility case in Wisconsin dealing with an alleged violation of due process rights. Due process is guaranteed by the Fourteenth Amendment, which states "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

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157. No. 2005AP646, 2006 Wisc. App. LEXIS 244 (Wis. Ct. App. Mar. 21, 2006).

without due process of law.”<sup>158</sup> The following case involved adult entertainment.

*Manos v. City of Green Bay*<sup>159</sup>

The plaintiff, Ted Manos, was the owner of a tavern named the Bunny Hop Inn. On December 1, 1971, Manos was cited for violating a City of Green Bay ordinance, when police officers witnessed a female dancing topless in the Bunny Hop Inn. On June 14, 1972, the Green Bay Common Council refused to grant the plaintiff's application for renewal of his liquor license. The plaintiff sued the city, contending the refusal to renew his liquor license violated his due process rights. Both parties filed motions for summary judgment. The court granted the defendant's motion.

The court found that the plaintiff had a constitutionally protected property interest in his liquor license. However, the court held that the plaintiff must receive procedural due process that satisfied the minimum standards of due process. The court determined that the city provided adequate due process because the plaintiff received notice of the hearing and the charges against him. He was also given an opportunity to present a defense and confront opposing witnesses.

C. Equal Protection

Wisconsin has also had one equal protection case dealing with entertainment facilities and adult entertainment. Equal protection is guaranteed under the Fourteenth Amendment. The Amendment reads, “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>160</sup>

*Fond du Lac County v. Burnett*<sup>161</sup>

George Burnett was convicted of violating Fond du Lac County's cabaret license ordinance. Burnett was cited for violating the ordinance when two police officers came to Burnett's tavern for a routine check. The police officers found a woman in a bikini dancing on the bar while men placed money in her garment. The officers also witnessed televisions broadcasting sexual acts. Burnett violated the cabaret license ordinance because he did not

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158. U.S. CONST. amend. XIV.

159. 372 F. Supp. 40 (E.D. Wis. 1974).

160. U.S. CONST. amend. XIV.

161. 476 N.W.2d 26 (Wis. Ct. App. 1991).



have a cabaret license and the woman was not dancing on a raised platform separated from patrons by a railing. He also violated it by showing sexually graphic films, which the ordinance prohibited.

Burnett argued that the ordinance violated his constitutional right to equal protection because the ordinance only applied to establishments in unincorporated areas. The trial court denied Burnett's motion to dismiss the citation and convicted him of the violation. He appealed the conviction, again claiming the ordinance violated his equal protection rights.

The court of appeals reasoned that the ordinance treated everyone in the county equally. Those living in incorporated areas were not subject to the ordinance because their villages or cities had not adopted a similar ordinance, but the county had treated everyone within its jurisdiction equally. The court upheld the conviction, holding that the ordinance was not unconstitutional and did not violate Burnett's equal protection rights.

#### VIII. NEW TECHNOLOGIES (COMPUTER/INTERNET)

The proliferation of the use of the internet has led to many legal issues concerning the production and use of materials contained on the World Wide Web. Although the use of the Internet has proliferated, little litigation has occurred. While the only cases to this point have focused on tort claims, it is expected that in the future cases may develop covering claims of copyright or trademark infringement perhaps as a result of the illegal downloading of protected copyrights and trademarks. Moreover, in the constitutional law arena, in 2001, a statute was passed that prevents state-run internet sites from obtaining personal information about users without the users' consent.<sup>162</sup>

##### *1. Tort Law*

The available Wisconsin cases dealing with new technology are tort cases. More specifically, both cases involved allegations of defamation and unfair competition on the internet. Because the internet is global, jurisdictional questions often arise in these cases. To be tried in a state court, the party needs to have enough contact with the specific state such that the court is satisfied that it has personal jurisdiction over the party. Another question that arises in these cases relates to how certain statutory definitions, which are not specifically applicable to new technology, can be applied to new technology.

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162. WIS. STAT. § 19.68 (2006).

*It's in the Cards v. Fuschetto*<sup>163</sup>

Meneau was the owner of *It's in the Cards* in Wisconsin. Fuschetto was from New York. The two exchanged messages through SportsNet, an online forum where sports memorabilia dealers communicated to buy and sell goods. Eventually, the two men spoke over the phone. Meneau had arranged a trip to visit Fuschetto, but when Fuschetto and his wife became ill he asked Meneau to postpone the trip. A dispute arose over the cost of the airline tickets, and tickets to a Knicks game and the David Letterman Show. Fuschetto posted the dispute on the bulletin board feature of SportsNet. Meneau then filed suit for defamation, negligence, and tortious interference with business relations. The circuit court granted Fuschetto's motion for summary judgment because it applied the statute for periodicals,<sup>164</sup> which required Meneau to request a retraction before asking the courts for relief.

The court of appeals noted that the definition of "periodical" in Webster's Dictionary did not include internet bulletin boards because they are not published on a regular basis. The court noted that it was the legislature's responsibility to amend statutes in order to keep pace with technology, and the court was not willing to expand the definition and the statute to include bulletin boards. The lower court's judgment was reversed and remanded.

*Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*<sup>165</sup>

Hy Cite was a Wisconsin-based business selling china, cookware, and glassware. The Badbusinessbureau.com was a foreign company, which ran a website where customers could complain about businesses. The complaints were available for others to see on the internet through the "rip-off report." The defendant offered an opportunity to post rebuttals or enroll in a program to resolve consumer complaints, both for a cost. The plaintiff claimed through the website that the defendant was engaged in unfair competition, false advertising, and trademark violations. The defendants had limited contact with Wisconsin, and therefore, filed a motion to dismiss for lack of personal jurisdiction.

The court granted the motion to dismiss for lack of personal jurisdiction because the plaintiff failed to meet the constitutional requirements for jurisdiction; the foreign company did not have minimum contacts with the state. Applying the same reasons, the court determined that the requirements

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163. 535 N.W.2d 11 (Wis. Ct. App. 1995).

164. WIS. STAT. § 895.05(2).

165. 297 F. Supp. 2d 1154 (D. Wis. 2004).

for general jurisdiction and specific jurisdiction were also not met.

#### IX. CONCLUSION

The Wisconsin courts have handled numerous claims involving a variety of legal issues within the development of the Wisconsin entertainment industry. This report has attempted to provide an overview of the many ways in which the courts have had to interpret the legal impact on the entertainment industry.

The report can serve as a valuable tool for practitioners attempting to understand the impact of the law on the entertainment industry in the state of Wisconsin. In the future, claims pertaining to the law's impact on the entertainment industry will increase as the industry continues to expand and grow.